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Supreme Court of the United States

OCTOBER TERM, 1991

INDUSTRIAL HELICOPTERS, INC.
Defendant-Petitioner

VERSUS

MICHAEL J. GREEN
Plaintiff-Respondent

UNITED STATES FIDELITY
& GUARANTY COMPANY
Plaintiff-intervenor/
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE LOUISIANA SUPREME COURT

APPENDIX VOLUME II

CHARLES R. SONNIER #12260
SONNIER, HEBERT & HEBERT
Two South Magdalen Square
P. O. Drawer 700
Abbeville, La 70511-0700
(318) 893-5973
ATTORNEYS FOR
INDUSTRIAL HELICOPTERS, INC.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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APPENDIX H

SUPREME COURT OF LOUISIANA

NUMBER: 90-C-1403

MICHAEL J. GREEN
Plaintiff-Respondent

UNITED STATES FIDELITY
& GUARANTY COMPANY
Intervenor-Respondent

VERSUS

INDUSTRIAL HELICOPTERS, INC.
Defendant-Applicant

APPLICATION OF
INDUSTRIAL HELICOPTERS, INC.,
FOR WRIT OF CERTIORARI OR REVIEW
TO REVIEW THE DECISION OF THE
COURT OF APPEAL, THIRD CIRCUIT

Mr. Charles R. Sonnier
Mr. Fred W. Davis
SONNIER, HEBERT, CABES
& HEBERT
Magdalen Centre
Two South Magdalen Square
P.O. Drawer 700
Abbeville, La 70511-0700

ATTORNEYS FOR APPLICANT,
INDUSTRIAL HELICOPTERS, INC.

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INTRODUCTION

INDUSTRIAL HELICOPTERS, INC. files this application to the Supreme Court for a writ of certiorari based on a legal anomaly which presently exists in the Third Circuit Court of Appeals. Two separate panels of the Third Circuit, in the instant case of Michael Green vs. Industrial Helicopters and in a previous decision of *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir. 1989), *rehearing denied*, came to different legal conclusions and application of law where there was no significant distinction between the facts of either case and, furthermore, the facts of each were completely analogous.

We request that the Court give serious consideration to our application which is primarily based on Assignment of Error No. I, however, other assignments have been preserved in accordance with court rules should further briefing be required.

STATEMENT OF THE CASE

MICHAEL GREEN filed suit against INDUSTRIAL HELICOPTERS and DOUG WRIGHT seeking numerous items of damages.

The petition filed just under one year from the date of the accident, November 26, 1984, (but not served on Industrial Helicopters until November 1985) alleged that GREEN was employed by Southern Petroleum Laboratories, Inc. (SPL) which had engaged the services of Industrial Helicopters "as an air taxi for transportation from Milton, Louisiana to Aminoil platform at High Island 561 and High Island 309", approximately 90 miles offshore. SPL was and is engged in oil and gas production service business. GREEN sought his damages under a theory

of negligence including the individual negligence of the pilot, Doug Wright, and the negligence of Industrial Helicopters under Civil Code Article 2315. He also claimed in his petition that Industrial Helicopters was responsible on the basis of strict liability for the defects existing in the helicopter pursuant to Article 2317 of the Louisiana Civil Code and "other applicable Federal or Louisiana statutes" (emphasis ours). He also asserted claims under the theory of res ipsa loquitur. Plaintiff initially sought over $870,000.00 in damages.

United States Fidelity and Guaranty Company (USF&G) was the workmen's compensation insurer of Southern Petroleum Laboratories. They filed a petition for intervention seeking reimbursement for medical payments and workmen's compensation payments made to GREEN, as a consequence of the accident. Although the suit was initially filed claiming a right under the Louisiana Compensation Act, they later amended the petition for intervention stating, significantly for this writ application, USF&G's payments were under the *Federal* Longshoreman's and Harbor Worker's Act (LHWCA).

The LHWCA nature of the compensation was also confirmed by testimony at court and by intervenor's pretrial memorandum. The LHWCA is applicable to maritime related injuries. 33 USC Sec. 905(b).

The intervenor's pleadings clearly indicate that the intervention and compensation is based on 33 USC Sec 905, 933 and 953 giving a maritime related employee the right to file suit against a third party tortfeasor for injuries sustained in a work related accident, if the third party is not otherwise immune from tort liability by other provisions of the LHWCA.

GREEN's claims are based on the following facts.

He was employed by SPL as a gas meter instrument technician, when on November 26, 1984, he was riding as a passenger in a helicopter operated by Doug Wright and owned by INDUSTRIAL HELICOPTERS. He was being transported to an offshore oil platform in the Gulf 90 miles from the Louisiana coast. The helicopter suddenly and with very little warning lost engine power, caused by mechanical failure of the helicopter's governor mechanism, and descended into the Gulf of Mexico. During the time of descent into the Gulf, the pilot had ample opportunity to instruct passenger GREEN to prepare for the landing on the water. The pilot maneuvered the helicopter to where the craft landed softly on its pontoons. The FAA called the accident an "incident". Shortly thereafter a rescue capsule operated by Exxon personnel from an adjacent oil platform, was sent to the floating and disabled helicopter. At that time, there was no apparent or expressed physical impairment by GREEN. The helicopter sank before being able to be retrieved. Testimony indicated that GREEN may have hit his head on the Exxon rescue capsule while being rescued. He also claimed he suffered injuries as a result of the helicopter impacting the water.

Industrial Helicopters had implemented an extensive and thorough maintenance schedule on all of its equipment and helicopters, including the one which unexpectedly descended into the ocean. The helicopter's governor mechanism was a sealed unit which could not be maintained or visibly inspected by INDUSTRIAL HELICOPTERS.

For three and a half (3 1/2) years from December, 1984, GREEN engaged numerous medical professionals seeking evaluation and assistance for his alleged injuries. Dr. Michael Heard, orthopedic surgeon, had released GREEN to return to his regular work without restriction.

GREEN continued to do light duty work for SPL until May, 1985. By August of 1985, Dr. Thomas Laborde, a specialist in physical medicine and rehabilitation, found that he could not do anything more for Mr. GREEN. Dr. Randolph Malloy treated GREEN's alleged TMJ problem such that GREEN's condition was improved by the end of 1987.

Plaintiff had a pre-existing TMJ problem verified by Dr. Barrios. He also was involved in an automobile accident in December, 1987 which rendered him unconscious.

After GREEN was no longer employed for SPL, he received training in electronics and obtained employment with MASCO at an hourly rate of $1.30 less than what he had been earning prior to the alleged injuries.

ACTION OF THE TRIAL COURT

By judge trial on May 3 and 4, 1988, the Trial Court found defendant, INDUSTRIAL HELICOPTERS, liable to GREEN only under a theory of strict liability. Judgment of the Court awarded $40,000.00 in general damages, $25,000.00 for past and future economic damages, $18,747.75 in past medical expenses and $15,000.00 for future medical expenses for a total amount of $98,747.75 with legal interest from date of judicial demand, November 25, 1985. The Court further found judgment in favor of USF&G, the workers compensation intervenor, in the amount of $43,747.75 in workers compensation benefits and medicals paid to MICHAEL GREEN.

The Court also found in favor of Doug Wright and against MICHAEL GREEN and USF&G dismissing GREEN's claim against Wright. The Trial Court cast INDUSTRIAL HELICOPTERS with 2/3 of the costs and

MICHAEL GREEN with 1/3 of the costs.

The trial judge specifically found that neither INDUSTRIAL HELICOPTERS nor Doug Wright were liable under any theory of negligence. The Court found that Wright's "handling of the emergency situation was extraordinary" and found no pilot error. It further found that INDUSTRIAL HELICOPTERS was not negligent in the maintenance or inspection of its helicopters and that it was not possible for the defendant to have discovered the defective governor. In the opinion of the Trial Court, the plaintiff failed to prove any negligence of INDUSTRIAL HELICOPTERS in the care and operation of its helicopter. INDUSTRIAL HELICOPTERS was nonetheless held liable for any damages caused by a defective thing in its care, custody or control under Louisiana Civil Code Article 2317.

The Court determined the sole and proximate cause of the crash to be the engine failure caused by the mechanical failure of the craft's governor. The governor had to be sent to a special facility for maintenance and was not subject to internal inspection or maintenance by INDUSTRIAL HELICOPTERS as it was a sealed unit which could not be maintained by INDUSTRIAL HELICOPTERS and which mechanics' could not visibly inspect.

ACTION OF THE APPEALS COURT

The Court of Appeals affirmed and amended the Trial Court's decision.

The Appeals Court increased the plaintiff's past lost wages award to $66,400.00 and eliminated any award made for future lost wages (loss of earning capacity), thus in-

creasing plaintiff's total award to $140,147.75.

The Appeals Court amended the Trial Court's judgment to allow intervenor full recovery of USF&G's intervention of $66,485.38.

The Appeals Court also found plaintiff and intervenor entitled to legal interest from date of judicial demand but remanded the case to the Trial Court to hold a contradictory hearing on INDUSTRIAL HELICOPTERS' Motion for Deposit of Money Into Registry of Court and grant same only if *LaGraize v. Bickham*, 391 So.2d 1185 (La. App. 4th Cir. 1980) conditions were not met by defendant. (See The Appeal Process and Deposit of Money, infra.)

The Court agreed with the Trial Court's exculpating Wright and INDUSTRIAL HELICOPTERS from any liability under negligence. The Court did find plaintiff proved by a preponderance of the evidence that defendant, INDUSTRIAL HELICOPTERS, INC. owned the helicopter and it was in its custody, and that it was strictly liable to plaintiff based on plaintiff's proof of a defect in the helicopter which created an unreasonable risk of harm to MICHAEL GREEN. This Court agreed that the failure of the aircraft's governor caused it to lose altitude and crash. The Appeals Court found plaintiff proved defendant was strictly liable for damage plaintiff sustained under Civil Code Article 2317.

The Appeals Court found INDUSTRIAL HELICOPTERS third party fault and/or intervening cause defenses to be without merit.

It also found the Trial Court did not abuse its discretion in its award of general damages and future medical expenses.

On application for rehearing, the Appeals Court voted 2 - 1 to refuse same, however, Judge Stoker would have granted the rehearing limited to the question of whether LSA-CC Article 2317 is applicable to determine whether the Court's decision is in conflict with *Duhon v. PHI,* 554 So.2d 1270 (La. App. 3rd Cir. 1989) and if so, to determine which view is correct.

THE APPEAL PROCESS AND DEPOSIT OF MONEY INTO REGISTRY OF THE COURT

This segment is inserted in the writ application to chronologize for the Court the events surrounding the deposit of money into the Registry of the Court. We address as an assignment of error the Appeals Court's finding that legal interest should accrue from the date of judicial demand despite INDUSTRIAL HELICOPTERS' tender of money into the Court's registry.

The suspensive appeal delays related to the judgment rendered July 7, 1988 had expired. INDUSTRIAL HELICOPTERS, not wanting to risk seizure of assets, offered the judgment amount of $130,048.83 to plaintiff which was not accepted due to disagreement between plaintiff and intervenor as to how the proceeds were to be apportioned and/or the reticence of the intervenor to sign a satisfaction of judgment. Thus, plaintiff refused the tender of money leaving INDUSTRIAL HELICOPTERS the alternative of placing the money in registry of the court or suffering the risk of the judgment being executed.

By motion and order dated September 26, 1988, INDUSTRIAL HELICOPTERS deposited the judgment amount into the registry, said motion also including a

cancellation of judgment, and a request for a hearing if the court or the parties deemed it necessary. The Motion required any party desiring to withdraw the funds to file an appropriate motion and order and reserved unto all parties rights for devolutive appeals or answers of said appeals.

Plaintiff then devolutively appealed the Trial Court's judgment seeking an increase in damages. Intervenor also appealed seeking additional intervention monies. INDUSTRIAL HELICOPTERS answered the appeals seeking reversal of the Trial Court's judgment.

After the devolutive appeal was filed, the plaintiff and intevenor unilaterally withdrew the funds by formal motion and order without notice to counsel for INDUSTRIAL HELICOPTERS and without otherwise informing INDUSTRIAL HELICOPTERS.

ASSIGNMENT OF ERROR I

THE APPEALS COURT AND DISTRICT COURT ERRED IN APPLYING CIVIL CODE ARTICLE 2317 AND FAILING TO RULE THAT THE GENERAL MARITIME LAW PREEMPTS 2317

The main thrust of this writ application concerns INDUSTRIAL HELICOPTERS' contention that the Appeals Court and Trial Court erred in applying Louisiana Civil Code Article 2317, and the theory of strict liability to the facts of this case which involved essentially a maritime accident in offshore waters, which should be governed by the General Maritime Law. Under the General Maritime Law, proof of negligence is required but there is no corresponding theory of strict liability under such law. Article 2317, however, deals exclusively with strict liability and requires no proof of negligence. The substantive law

conflict requires that general maritime law preempt 2317. Both courts below committed error in not applying general maritime law and failing to exculpate defendant, INDUSTRIAL HELICOPTERS, from liability based on INDUSTRIAL HELICOPTERS' lack of negligence in operation or maintenance of the helicopter in which GREEN was traveling when the accident occurred. In its post trial brief to the Trial Court and repeated in the appeals process, Defendant asserted the need to prove negligence. Since helicopters perform traditional maritime activities, claims against the vessel (helicopter) owner are controlled by the precepts of unseaworthiness. Such precepts are dispositive of a passenger's claim for damages and not strict liability. (Defendants Post Trial Brief, p. 4-9.)

The *Green* decisions below stand in direct conflict with *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir. 1989), *rehearing denied*, which held that the State's strict liability remedy (2317) for damages caused by a thing in custody was not available to an injured helicopter passenger in an admiralty case brought in state court under the "savings to suitors" clause of the admiralty jurisdiction statute. *Duhon* further held that maritime law requiring an injured passenger to prove negligence in order to recover from a common carrier prevailed over the state's strict liability remedy for damages caused by a thing in custody, which would not require proof of negligence.

Judge Stoker of the *Green* Appeals Court panel below, on application for rehearing, would have granted a rehearing on this case on the issue of the conflict between the *Green* decision and *Duhon* and to determine which view is correct.

INDUSTRIAL HELICOPTERS contends the Supreme Court should now grant a writ herein to resolve this con-

flict within the Circuit, wherein two separate panels ruled differently on basically the same set of facts. The Supreme Court should definitively decide the issue of the general maritime preemption of Civil Code Article 2317 under facts and circumstances bearing a significant relationship to traditional maritime activities, regardless of whether a suit is brought in state court under 2317 or the suit is incepted under the "savings to suitors" clause.

Duhon is a case of first instance where Civil Code Article 2317 is said to be inapplicable to claims arising under the General Maritime Law.

The *Duhon* case was decided by the Appeals Court at the time the *Green* case was on appeal.

The facts of the *Green* case, (See Statement of Case, *supra*) are indistinguishable from *Duhon*. We contend the facts give rise to an action under maritime law even if such claim is not affirmatively asserted in the plaintiff's petition. (We hasten to repeat that Plaintiff asked for relief under all applicable *Federal* or Louisiana Statutes [emphasis added]).

The jurisprudence supports INDUSTRIAL HELICOPTERS' contention that the *Duhon* holding should also apply in *Green*.

Claims arising from an aircraft accident are cognizable in admiralty if the wrong sued upon bears a significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S. Ct. 493 (1972).

The crash of a helicopter while being used in place of a vessel to ferry personnel and supplies to and from an off-

shore drilling structure bears a significant relationship to traditional maritime activities to support admiralty jurisdiction under the "savings to suitors" clause, 28 USC Sec. 1333. *Ledoux v. Petroleum Helicopters, Inc.,* 609 F.2d 824 (5th Cir. 1980), *rehearing denied* 612 F.2d 579.

Admiralty jurisdiction is present in an action arising out of a helicopter crash into the high seas in the Gulf of Mexico outside the boundaries of the state, where the helicopter performs the ordinary functions of a crewboat, ferrying workers from offshore rigs to the mainland. *Higginbotham v. Mobil Oil Corp.,* 357 F.Supp 1164 (W.D.La. 1973), supp. op. 360 F.Supp. 1140 (W.D.La. 1973), affirmed in part, and reversed in part on other grounds 545 F.2d 422 (5th Cir. 1974).

Bordelon v. T.L.James & Co., 380 So.2d 226 (La. App. 3rd Cir. 1980), held that a state court hearing a case within a federal admiralty jurisdiction pursuant to the "savings to suitors" clause is required to apply substantive admiralty or maritime law if the claim is cognizable in admiralty.

28 USC 1333 preserves state court jurisdiction for common law maritime remedies and actions but it does not create federal court jurisdiction for maritime causes of action. *Steel and Metal Co. v. Hartford Fire Ins. Co.,* 376 F.Supp. 763 (D.C. Conn. 1974).

A helicopter ferrying passengers from shore to an artificial island is engaged in a function traditionally performed by waterborne vessels, and if it is involved in an accident on the high seas, admiralty jurisdiction is invoked. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485, (1986).

Where plaintiffs are in a state court seeking a remedy for a wrong, and the remedy sought under state law alters or conflicts with the maritime or admiralty law which establishes the substantive rights of the parties, then the federal substantive admiralty or maritime law controls. *Hebert v. Diamond M. Co.*, 367 So.2d 1210 (La. App. 1st Cir. 1978). *Freeport Sulphur Co. v. S.S. Hermosia*, 526 F.2d 300 (5th Cir. 1976); *State of La. ex rel Guste v. M.V. Testbank*, 752 F.2d 1019 (5th Cir. 1985).

Suffice it to say, based on the above, that a maritime action in state court requires the state court to apply federal law so a single uniform body of maritime law may be created. Any conflict between the state and federal law must result in federal law preempting state law.

The *Duhon* court recognized all of these principles in coming to their conclusions and ruling that Civil Code Article 2317 is in effect preempted by the federal substantive maritime law in those tort circumstances where general maritime law determines liability. The *Duhon* court recognized what the Appeals Court and Trial Court in *Green* did not. Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, Civil Code Article 2317 does not require proof of negligence, thus, there is a substantive conflict affecting the rights of the parties and the maritime law must ultimately prevail to determine those rights.

Plaintiff acknowledged the maritime nature of his claim when in his brief he argued that the state court decision of *Brooks v. Chicola*, 514 So.2d 7, (La. 1987) was not applicable to federal compensation under LHWCA, although he sought to distinguish such federal cases on the basis of "the inadequate award" in his case.

The trial judge originally limited the intervenor's recovery to the plaintiff's award for economic damage and medical expenses, prohibiting recovery or reimbursement from the general damages under the authority of the state court decision for state workers compensation interventions in *Brooks v. Chicola, supra.*

The Appeals Court, however, increased the intervenor's recovery, bypassing any consideration of the *Brooks* decision or the maritime nature of the Green facts as they applied. Our point in bringing this issue before the Court now is to underline the argument that all parties knew they were dealing with a federal maritime claim in these proceedings.

To further support our argument for Supreme Court review, we contend that the facts of the *Green* case clearly suggest a traditional maritime activity and under the Louisiana Code of Evidence Article 202 a court is empowered to take judicial notice of certain legal matters.

Article 202 states under Subsection A certain requirements for mandatory judicial notice of legal matters:

> "202 A. A court, whether requested to do so or not, shall take judicial notice of the laws of the United States, of every state ...."

Since the federal substantive maritime law is a law of the United States, the jurisprudence interpreting the law of maritime torts simply does not allow for the application of state law under Civil Code Article 2317.

Indeed, under Comment (c), under Article 202:

> "Law" includes the common law as well as statutory law thus incorporating all judicial de-

> cisions authoritative in their respective jurisdictions, and embraces decisions that interpret or apply both the common law and statutes.

Furthermore, under Article 202 (B) (1) (f) the Code of Evidence states:

> "A court shall take judicial notice of the following ... and may take judicial notice without request of a party of ... maritime law."

Comment (d) under that Article states "Maritime Law" refers to those principles and rules of the general maritime law that are recognized by maritime nations of the world.

We contend *Duhon* is the appropriate pronouncement of the applicable law with regard to facts in Duhon's accident or GREEN's accident.

Defendants contend that Article 2317 of the Louisiana Civil Code is a significant expansion on the actions and remedies provided by general maritime law and is not a proper basis for GREEN's recovery and that the courts below failed to apply the general maritime law standard which required a proof of negligence. Plaintiff *GREEN* failed to prove negligence. Both lower courts noted that, in fact, Doug Wright and INDUSTRIAL HELICOPTERS were free of negligence either in maintenance or operation of the helicopter. Thus, under general maritime law, INDUSTRIAL HELICOPTERS should not be liable to MICHAEL GREEN. Therefore, the Appeals Court decision affirming the Trial Court's finding of liability should be reversed. Civil Code Article 2317 did not apply to *Duhon*. It cannot and should not apply to *Green* as a matter of law.

THE DUHON FACTS AND CASE

In order to have a better appreciation of defendant's contentions that the *Green* case is, for all practical purposes, indistinguishable from the *Duhon* facts, it is helpful to expound on the relevant and analogous facts.

Duhon was a passenger aboard a PHI helicopter involved in an accident in 1983 in offshore waters "well beyond a marine league" from the Louisiana coast. Duhon claimed personal injuries and in addition to suing other defendants, sued PHI, the owner of the aircraft.

Duhon's suit was brought pursuant to the "saving to suitors" clause, 28 USC Sec. 1333. His claims were based on strict liability under Louisiana tort law Civil Code Article 2317 and general maritime law.

Duhon was employed by Southern Petroleum Laboratories of Lafayette, Louisiana, as a meter technician. His employment required him to be transported from Lafayette to offshore oil platforms out in the Gulf well beyond the Louisiana coast. SPL had contracted with PHI to ferry SPL employees by helicopter to these locations.

The analogies to the facts of the *Green* case are extraordinarily similar down to the same company and the same job description and the same circumstances in the Gulf but they get even more similar.

In the only accident relevant in *Duhon* which is germane to the issue brought by this writ (Duhon had claimed injury resulting from two accidents), Duhon was a passenger on the PHI helicopter heading to a platform when the engine quit at an altitude of 1,000 to 1,500 feet. The pilot brought the aircraft straight down in a slow des-

cent. The FAA categorized the *Duhon* landing as an "incident" rather than a crash. The engine quit running because a blade on the gas producer rotor of the engine failed as a result of vibrator stress.

The helicopter remained afloat until a rescue vessel arrived two hours later. The rescue proceeded when Duhon jumped from the helicopter to a boat ladder and was momentarily pinned by the nose of the aircraft against the vessel. There were no apparent injuries to Duhon as a result of the emergency landing or the rescue.

The *Duhon* court found a defect in the engine of the PHI helicopter based on a power loss related to the separation of the gas producer blade, caused by metal fatigue, which caused a mechanical failure in the engine.

The trial judge in *Duhon* granted a directed verdict for the plaintiff finding, among other things, (but only relevant for our argument here) that PHI was liable to plaintiff under Civil Code Article 2317 as custodian of the aircraft.

On the above set of facts, the *Duhon* appeals court reversed the trial judge, finding liability of PHI controlled exclusively by the general maritime law under the various jurisprudence set forth above. They specifically found that the remedy under Civil Code Article 2317 was unavailable to plaintiffs in this admiralty case. We contend that Green is similarly situated as a plaintiff much in the same way Duhon was.

The *Duhon* court noted the theories underlying Civil Code Article 2317 have no corresponding theory in general maritime tort law. Especially, the custodian cannot be absolved from strict liability even if the party proves that he did not know, and could not have known of the unreason-

able risk of harm. There is no parallel theory of recovery under general maritime law for torts.

Indeed as the *Duhon* court noted:

> "There is no implied warranty of seaworthiness extended to passengers... Instead, a carrier's duty when transporting passengers requires him to exercise a very high degree of care .... [m]erely because an accident occurs, however, a carrier does not become liable to a passenger .... [A] passenger may recover personal injury damages only if he proves the fault or negligence of a carrier ... (Citations omitted)
>
> Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, and Louisiana Civil Code Article 2317 does not require proof of negligence, there is a substantive conflict effecting the rights of the parties, and the maritime law must prevail. *Duhon* at page 1277-1278.

The *Duhon* court found pilot negligence was not at issue (the jury found no pilot error and it was not assigned as error), leaving only the consideration whether the failure of the engine was caused by any negligence on the part of PHI or whether PHI had knowledge of the engine's propensity to fail, and flew in disregard of that knowledge. (There was some evidence of similar engines failing in similar helicopters.)

The *Duhon* court found:

> Nothing PHI did in the way of maintenance or operation caused the blade to fail and there was nothing that it could have done to prevent it. Nor was there any evidence that PHI was aware that

such a problem might occur since it had not prior experience with such failures."
Duhon at pages 1277-1278.

The Court specifically found no proof, "not even of the smallest or slightest negligence against PHI," finding that the maintenance and operation did not result in any negligent conduct. (*Duhon* at pages 1277-1278.)

Significantly, the *Duhon* court did find that strict products liability law applied to the manufacturer of the engine as a viable theory of recovery against manufacturers. Duhon found that the general maritime law recognized this and that the Louisiana law of products liability was similar, thus creating no substantive law conflict in the case of products liability.

A summary of the relevant facts of the *Green* case which is the subject of the writ issue before this Court as outlined in the Statement of the Case, *supra*, and the facts of the *Duhon* case can be graphed as follows:

FACTUAL ELEMENT	DUHON	GREEN
Passenger aboard helicopter involved in accident in off-shore water	Yes	Yes
Claimant employed by SPL as meter technician	Yes	Yes
SPL contracted w/PHI or IH to ferry personnel to off-shore rigs	Yes	Yes
General Maritime Law Application	Yes	Yes

FACTUAL ELEMENT	DUHON	GREEN
Emergency helicopter landing in water called an "incident"	Yes	Yes
Helicopter engine quit running while over Gulf waters	Yes	Yes
Engine defect gas producer blade failed (mechanical failure of engine)	Yes	----
Engine defect mechanical failure of governor (sealed unit)	----	Yes
No apparent injuries to claimant	Yes	Yes
Maintenance and operation of helicopter by owner more than satisfactory (no negligence attributable to owner or pilot)	Yes	Yes
Owner of helicopter not liable under negligence	Yes	Yes
Owner of helicopter liable strict liability	No	Yes

The one glaring difference is that INDUSTRIAL HELICOPTERS (GREEN) was found liable under strict liability and PHI (Duhon) was not. It is the only substantial difference between the cases. This Court can remedy this glaring defect in application of law by granting a writ of review.

The factual analogies between *Duhon* and *Green* are overwhelming. We contend the *Green* legal result should follow *Duhon*. At present, two different panels of the Third Circuit with similar facts have decided what is essentially the same case, resulting in two opposite legal results and findings of liability. We contend the *Duhon* holding should be controlling, thus resulting in the reversal of the Appeals Court's decision in *Green*.

ASSIGNMENT OF ERROR II

THE APPEALS COURT ERRED IN HOLDING THAT THE DEPOSIT OF MONIES INTO THE REGISTRY OF THE COURT DID NOT SUSPEND ACCUMULATION OF LEGAL INTEREST ON THE JUDGMENT RENDERED

Defendant sought to terminate accumulation of legal interest on the amount of the judgment against it through the filing of a Motion and Order for Deposit of Money into Registry of the Court and Cancellation of Judgment. The Order was signed September 26, 1988 (See the Appeal Process and Deposit of Money into Registry, *supra*).

The Appeals Court, relying on *LaGraize v. Bickham*, 391 So.2d 1185 (La. App. 4th cir. 1980) and *Gagnet v. Zoummo*, 487 So.2d 721 (La. App. 5th Cir. 1986), stated that in order for INDUSTRIAL HELICOPTERS to obtain the benefit of such deposit (relief from additional interest and costs), certain conditions were required to be met. Not being able to determine whether the conditions as set forth in *LaGraize* were met, the Court remanded to the Trial Court for a contradictory hearing on the defendant's motions to instruct the trial judge to grant the motion only if the *LaGraize* conditions were met.

The *LaGraize* conditions as enunciated at pages 1190-1191 in that decision are:

1) Tender to and refusal to accept by the judgment creditor;
2) Tender and/or the deposit must be for the full amount of the judgment, including costs and interest;
3) The tender must be unconditional and constitute a complete waiver of any future defenses to liability on the part of the judgment debtor.
4) Acceptance of the tender and/or withdrawal of the funds by the judgment creditor is without prejudice to any of its rights to appeal as to quantum.
5) In the event of an increase in quantum on appeal, the judgment debtor is liable for all additional costs together with interest on the amount of the increase from the date of judicial demand until paid.

The Defendant seeks to stop the accrual of legal interest on the amounts awarded by the Trial Court and encompassing that time period between the date of the order allowing deposit of funds on September 26, 1988 until the present. The lone exception, of course, is if the Appeal Court's amendment to the trial judgment award remains, there will, of course, be judgment from date of judicial demand on that additional increase in the award.

Defendant argues that his tender of the proceeds in this matter fulfilled the *LaGraize* conditions and that a remand to the Trial Court is not necessary.

We would take issue however with the fact that such a tendering of money should not and cannot under any principle of equity or law cut off the judgment debtor's right to appeal the judgment. The deposit of the money was simply done because the plaintiff failed to accept the tender of the money and the defendant was left in a situa-

tion on where some of its assets may have been subject to seizure since the suspensive appeal delays had expired.

INDUSTRIAL HELICOPTERS would simply take issue with the fact that any such deposit of money, even if it does meet the *LaGraize* conditions cannot and should not preclude the defendant's answering the devolutive appeal taken by the plaintiff and intervenor. If legal interest is awarded from date of judicial demand, then the plaintiff, by removing the proceeds from the registry, is awarded in effect, interest on interest, assuming Plaintiff deposited funds for his own benefit once the money was withdrawn. Surely this result is not equitable. Had the money been allowed to remain in the registry of the Court, it would have continued earning interest in the clerk's account while at the same time the Defendant would have been protected from judicial execution of the assets. Instead, the plaintiff and intervenor withdraws the funds, files an appeal and also claims legal interest. To grant legal interest is indeed error.

INDUSTRIAL HELICOPTERS lists this assignment of error to preserve same should a writ be granted, and reserves further rights to brief same, if necessary.

ASSIGNMENT OF ERROR III

THE TRIAL COURT AND APPELLATE COURT ERRED IN FINDING DEFENDANT LIABLE TO PLAINTIFF.

We list this Assignment of Error to preserve our right to argue same, should the writ be granted, and hereby reserve all rights to further brief this issue at an appropriate time. We rely on that portion of our original appeals brief atached as an exhibit and entitled "Defendant-

Appellee's Assignment of Error I" to support our position that INDUSTRIAL HELICOPTERS should not have been found liable to plaintiff. This assignment is in addition to the full discussion regarding application of general maritime law argued in Assignment of Error I herein in this writ application.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT AND APPELLATE COURT ERRED IN FAILING TO EXCULPATE DEFENDANT FROM LIABILITY BASED ON THE INTERVENING AND SUPERSEDING CAUSE THAT PLAINTIFF'S INJURIES OCCURRED ON THE EXXON RESCUE CAPSULE NOT AS A RESULT OF THE HELICOPTER LANDING.

We list this Assignment of Error to preserve our right to argue same, should the writ be granted, and hereby reserve all rights to further brief this issue at an appropriate time. We rely on that portion of our original appeals brief attached as an exhibit and entitled "Defendant-Appellee's Assignment of Error II" to support our position that INDUSTRIAL HELICOPTERS should have been exculpated from liability based on intervening and superceding causes.

ASSIGNMENT OF ERROR V

THE TRIAL COURT AND APPELLATE COURT ERRED IN NOT AWARDING JUDGMENT IN FAVOR OF DEFENDANT ABSOLVING IT FROM ALL LIABILITY TO PLAINTIFF, BECAUSE THE SUDDEN OCCURRENCE OR EMERGENCY DOCTRINE WAS BOTH APPLICABALE AND PROVEN AT TRIAL.

We list this Assignment of Error to preserve our right to argue same, should the Writ be granted, and hereby reserve all rights to further brief this issue at an appropriate time. We rely on that portion of our original appeals brief attached as an exhibit and entitled "Defendant-Appellee's Assignment of Error III" to support our position that INDUSTRIAL HELICOPTERS should not have been found liable to plaintiff because of the applicability of the sudden occurrence or emergency doctrine.

ASSIGNMENT OF ERROR VI

THE TRIAL COURT AND APPELLATE COURT ERRED IN AWARDING GENERAL DAMAGES IN THE AMOUNT OF $40,000.00 AND FUTURE MEDICALS IN THE AMOUNT OF $15,000.00.

We list this Assignment of Error to preserve our right to argue same, should the writ be granted, and hereby reserve all rights to further brief this issue at an appropriate time. We rely on that portion of our original appeals brief attached as an exhibit and entitled "Defendant-Appellee's Assignment of Error IV" to additionally support our position that the trial and appeals court abused their discretion in first awarding the amount of general damages and future medicals and affirming same.

ASSIGNMENT OF ERROR VII

THE APPEALS COURT ERRED IN INCREASING THE TRIAL COURT'S AWARD OF PAST LOST WAGES.

We list this Assignment of Error to preserve our right to argue same, should the writ be granted, and hereby reserve all rights to further brief this issue at an appropriate time. We rely on that portion of our original appeals brief attached as an exhibit and entitled "Plaintiff-Appellant's Assignment of Error I and II" to additionally support our position.

CONCLUSION

In light of the foregoing, your applicant prays that the Supreme Court grant a writ of certiorari to review the results of the instant case in light of the decision reached in *Duhon vs. Petroleum Helicopters, Inc., supra*, and the other Assignments of Error indicated herein.

Respectfully submitted,

SONNIER, HEBERT, CABES
& HEBERT

BY: /s/ Charles R. Sonnier
CHARLES R. SONNIER #12260

BY: /s/ Fred W. Davis
FRED W. DAVIS #1817
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973

ATTORNEYS FOR INDUSTRIAL HELICOPTERS, INC.

AFFIDAVIT AND CERTIFICATE OF MAILING

BEFORE ME, the undersigned Notary, personally came and appeared CHARLES R. SONNIER, who did declare and say that the allegations of this application are true and correct to the best of his knowledge, information and belief and that a copy of this application has this day been mailed to the Supreme Court of the State of Louisiana, the Third Circuit Court of Appeals and to all counsel of record, by placing a copy of this application in the United States Mail, properly addressed and postage prepaid.

/s/ Charles R. Sonnier
CHARLES R. SONNIER

SWORN TO AND SUBSCRIBED BEFORE ME, this 20th Day of June, 1990, at Abbeville, Louisiana.

/s/ Mary D. Ashley
NOTARY PUBLIC

APPENDIX I

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MICHAEL J. GREEN, ETC.

No. 88-1365

v.

INDUSTRIAL
HELICOPTERS, INC., ETC

RECEIVED
MAY 23 1990

BEFORE: JUDGES FORET-STOKER-LABORDE

ORDER

The Application...for Rehearing herein having been duly considered:

IT IS ORDERED that a Rehearing be, and the same is hereby, REFUSED

Lake Charles, Louisiana, this 22ND day of May, 1990

Stoker, J., votes to grant limited to the question of whether LSA-C.C. art 2317 is applicable to determine whether our decision here is in conflict with *Duhon v. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir. 1989), and if so, to determine which view is correct.

JBF

PJT

_____

Judges

Filed May 22 1990

/s/ Nancy U. Pledger

Clerk

Port No. 975

APPENDIX J

Michael Allen DUHON and Mary Kathryn Duhon,
Plaintiff-Appellants.

v.

PETROLEUM HELICOPTERS, INC., etc.,
Defendants-Appellees.

No. 88-875

Court of Appeal of Louisiana
Third Circuit.

Dec. 13, 1989

Rehearing Denied Jan. 23, 1990.

Writ Denied April 6, 1990

Helicopter passenger and his wife filed strict liability action under state law and general maritime law. The 15th Judicial District Court, Parish of Lafayette, Marcus Broussard, J., set aside a jury verdict and found that the helicopter owner and engine manufacturer were liable, but denied the passenger's motion for a new trial. Appeals were taken. The Court of Appeal, Yelverton, J., held that: (1) the strict liability remedy for damage caused by things in custody did not apply in an action under the general maritime law; (2) the engine manufacturer was liable for injuries caused by a defective gas producer blade; (3) the helicopter owner and manufacturer were not liable; (4) the engine manufacturer's conduct did not warrant the imposition of punitive damages; and (5) the total award of $112,000 to the passenger was adequate.

Affirmed in part; reversed in part; and rendered.

Keaty & Keaty, Robert B. Keaty, Lafayette, for plaintiffs-appellants.

McGlinchey, Stafford, Mintz, Cellini & Lang, Ken Laborde and Sharon Gross, New Orleans, for PHI and AVCO.

Roy & Forrest, L. Albert Forrest, New Iberia, for AVCO.

Jones, Walker, Waechter, Poitevent, Carrere & Denegre, Donald O. Collins, New Orleans, for Aerospatiale Helicopter.

McBride, Foret, Rozas & Leonard, Robert R. McBride, Lafayette, for USF & G.

Phelps, Dunbar, Marks, Claverie & Sims, Howard Daigle, Jr., New Orleans, for Garrett Corp.

Taylor, Porter, Brooks & Phillips, W. Luther Wilson, Baton Rouge, for Parker.

Before DOMENGEAUX, YELVERTON and KING, JJ.

YELVERTON, Judge.

Michael Allen Duhon was a passenger aboard a helicopter which was involved in two accidents in 1983 in the Gulf of Mexico. Claiming personal injuries suffered from both accidents, he and his wife, Mary Kathryn Duhon, sued multiple parties, the number of which by the time of trial were reduced to four: Petroleum Helicopters, Inc. (PHI), the owner of the aircraft; AVCO-Lycoming, the

manufacturer of the engine that powered the aircraft; Aerospatiale Helicopter Corporation and its parent company, Societe Nationale Industrielle Aerospatiale (collectively, Aerospatiale), the manufacturer of the aircraft; and John Airington, the pilot on both occasions.

Basing their claims on the strict liability provisions of Louisiana tort law and also on the general maritime law, Duhon asked for compensatory damages and punitive damages, and his wife sought an award for loss of consortium. After a three week trial the judge directed a verdict finding that Duhon was not contributorily negligent. The case was given to the jury in the form of a special verdict consisting of nine interrogatories, and the jury was instructed to answer at least the first eight. The jury responded to Interrogatory No. 1 of the special verdict by finding that Duhon suffered "injuries or an aggravation of a pre-existing condition", caused by one or the other, or both, of the landings at sea. The jury found that no defendant was liable. The jury then determined that Michael Duhon had $112,000 in damages and his wife had $10,000 in damages.

In post-verdict proceedings, the trial judge set aside the jury verdict as to the liability of PHI and AVCO-Lycoming, and found that those defendants were liable. The trial court denied the plaintiffs' motion for a new trial.

The plaintiffs have appealed claiming error in the failure to find Aerospatiale liable and in the failure to award punitive damages, and seeking an increase in the award. They alternatively asked for a new trial based upon the discovery of new evidence, and four allegedly erroneous evidentiary rulings by the trial judge.

The two defendannts who were cast in judgment also appealed. PHI assigns as error the directed verdict against it, arguing that the strict liability provision of La. C.C. art. 2317 is inapplicable in a suit under the general maritime law. AVCO-Lycoming assigns as error the directed verdict against it, arguing that there was no proof its engine was defective in either design or manufacture. The defendant do not complain on appeal of the amount of damages awarded.

THE AUTOROTATIONS AT SEA

Michael Duhon, age 28 at the time of trial, was employed by Southern Petroleum Laboratories of Lafayette, Louisiana, as a meter technician. His work required him to be transported from the shore base in Lafayette to offshore oil platforms in the Gulf of Mexico well beyond a marine league from the Louisiana coast. His employer had contracted with PHI to ferry him by helicopter to these locations.

On March 31, 1983, Duhon was the sole pasenger on one of PHI's helicopters, an A-Star AS350D, powered by an AVCO-Lycoming LTS 101 engine, flown by John Airington, headed to a platform some 35 miles offshore, when the engine quit at an altitude of 1,000 to 1,500 feet. The pilot autorotated the aircraft safely to the water. An autorotation descent of a helicopter was described by the experts as a procedure by which a pilot brings the aircraft more or less straight down, so that the updraft of air turns the main rotor providing lift to the helicopter and slowing its descent, much like a parachute. In accordance with applicable Federal Aviation Administration (F.A.A.) directives this landing was categorized as an "incident", rather than a crash, because the helicopter sustained no damage and there were no apparent injuries to its occupants. The

pilot testified that the aircraft landed with a jolt on touchdown. Flotation devices, called ditchbags, attached to the main landing gear, kept the helicopter afloat until a rescue vessel arrived about two hours later. In the meantime, the plaintiff and the pilot climbed on top of the helicopter and sat there and talked and waited. When the rescue boat arrive plaintiff jumped from the helicopter to the boat ladder, and while he was on the ladder wave action caused the nose of the aircraft to pin him momentarily against the vessel. This did not cause any apparent injuries and the plaintiff boarded the boat and went ashore.

An investigation following the incident of March 31, 1983, revealed that the engine quit running because a blade on the gas producer rotor of the engine failed as a result of vibrator stress.

About four months later, on July 26, Duhon was a passenger on the same aircraft piloted again by John Airington, when it once more autorotated into the Gulf of Mexico. The evidence rather conclusively established, bolstered by the plaintiff's own pretrial admission, that this was a soft landing, and that plaintiff suffered no injuries as a result of this incident. The cause of this incident was again the failure of an LTS 101 engine, although not the same engine involved in the earlier incident. An investigation resulted in a finding that the cause of this incident might have been the clogging of the fuel manifolds, but the engine was so badly corroded due to exposure to salt water when one of the flotation devices failed, that the experts were unable to say exactly what caused this engine failure.

The trial of the case took place four years after these incidents occurred, and massive discovery took place during that time. At trial plaintiff attempted to show that

structural damage to the aircraft following the July 26 landing, proved that it was a hard landing, or a crash, rather than a soft landing. The great weight of the evidence, however, indicates otherwise. After the helicopter landed, one of the flotation devices bust causing the aircraft to turn over in the water, but all of this occurred after plaintiff had left the plane and boarded an inflatable raft. The aircraft was thereafter towed in the water to a nearby platform, and the expert testimony indicated that it was this towing of the partially submerged aircraft in heavy seas that caused the structural damage, and not the landing itself.

Inasmuch as the evidence conclusively establishes that whatever injuries plaintiff suffered were incurred as a result of the March 31 incident, and not the July 26 soft landing, we consider it unnecessary to spend any more time discussing the July 26 landing.

A PARIAH IN THE HELICOPTER INDUSTRY?

The plaintiffs undertook to convince the jury that the A-Star AS350D aircraft with its AVCO-Lycoming LTS 101 engine was what they described as a "pariah in the helicopter industry". They attempted to show that AVCO-Lycoming and PHI administrative personnel, as well as Aerospatiale, knew that all LTS 101 engines were unreliable, and that, nevertheless, the engines were kept in use. It was this alleged conduct on which they based their claim for punitive damages. Believing that if there was proof of the elements for punitive damages, all other proof requirements to show fault would take care of themselves, their strategy was throughout to present a punitive damage case.

There was a defect in the LTS 101 engine that failed

on March 31. Robert K. Phillips, an expert in aircraft accident investigation and failure analysis, testified by deposition for the plaintiffs. He opined—and this fact is conceded by the defendants—that the March 31 power loss was related to a separation of a gas produced blade, caused by metal fatigue, a mechanical failure in the engine. This is what caused the helicopter to have to go down.

Another expert witness, Guido Semprebon, an aeronautical engineer formerly employed by AVCO-Lycoming, examined the blade and explained that it failed due to vibratory stress fatigue. According to him, this is a problem that is anticipated in the design and manufacture of the blade, but, because of the tolerance that the blade is manufactured to in the casting, no two castings and no two blades are exactly alike. One could be stronger or weaker. This witness said, "The material equalizer could be different and a blade now and then gets excited". He said there then can occur an "upstream excitation". He knew of 18 or 20 AVCO-Lycoming engines in which this fatigue failure occurred, but that was before blade dampers were incorporated into rotors to control vibratory stresses. The engine involved in this case did not have blade dampers.

In the helicopter industry problems with new equipment are apparently normal and expected. Thomas W. Beavers, an operations inspector for the F.A.A. so testified. An experienced helicopter pilot himself, Beavers was an inspector from 1970 to 1986. He worked out of the Baton Rouge F.A.A. office, and one of his main responsibilities was to oversee the operations of PHI. He was called as a witness for PHI. He testified that he never had any information or knowledge that the A-Star was an unsafe aircraft. Beavers was extensively cross-examined by the plaintiffs covering, in depth, such general subjects as autorotation procedures, reporting procedures required by

the F.A.A. and the National Transportation Safety Board (N.T.S.B), and how to assess damage to aircraft. The subject of the LTS 101 engine was barely mentioned. Here is the complete cross-examination testimony on that subject:

Q. Anytime before July of 1983 in respect to your job at PHI and other operators, did you ever have occasion to come across information pertaining to the problems experienced by operators with the LTS 101 engine?

A. Yes.

Q. Can you tell us what it was Mr. Beavers?

A. No, sir. I just know that there were some failures and some corrective action taken. We would get correspondence through telling what—that the airworthiness inspectors must do to go out and see that these things were done. As all new engines—this was a new engine build—I'm not sure—for just this aircraft, but it was—this little, small engine was new and it was some problems, as all new equipment comes out with problems. But there was just corrective action, is what I'm talking about. That's what I would read about—the correction action that the F.A.A.'s taken on it.

None of the people close to this aircraft at PHI ever had any problems with the engine except the two incidents involved in this case. Vernon Elias Albert, vice-presidnet and chief pilot for PHI, testified that in 1983 he was aware that there had been some engine failures in the LTS 101. However, except for the failures with which this case is concerned, it does not appear that PHI had itself ever experienced any of these problems. Warren J. Cabaret, Jr.,

Director of Flight Safety, testified that he never heard any complaints about the LTS 101 engine, and that PHI was happy with the engine. Similar testimony was given by Frank W. Lee, PHI's president, who declared that there never were any unusual problems with the LTS 101. He said if he had ever thought that there were real problems, he would have grounded the equipment. The pilot, Airington, testified that he had been flying this aircraft, with the LTS 101 engine, for three years, and had complete confidence in it.

We go next to an explanation of the role that the jury played, and the role that the trial judge played, in fashioning the judgment that is before us on appeal. After that explanation, we will discuss the liability issues, the sufficiency of the award, and whether the evidentiary rulings were prejudicially erroneous.

WHAT THE JURY DID

The jury was instructed that ordinary negligence principles applied to the conduct of PHI. The jury was told that negligence was the failure to use reasonable care. The trial judge charged the jury that products liability law applied to the conduct of AVCO-Lycoming and Aerospatiale and explained what that was. In the damages part of the jury instructions, punitive damages were discussed, and the jury was told it could award punitive damages if it found that a defendant was "guilty of gross negligence or actual malice or criminal indifference, which is the equivalent of reckless and wanton misconduct".

The jury was asked to render its verdict in the form of answers to interrogatories. Here are the interrogatories, and the jury's responses, to the first eight questions:

1. Do you find that Michael Duhon suffered injuries on an aggravation of a pre-existing condition, either physical or mental, which was caused by the occurrence of March 31, 1983, or July 26, 1983, or both?

   YES X

   NO ___

2. Do you find that PHI and/or Evangeline Airmotive was at fault, either wholly or in part, under any of the rules of law which I have explained to you for either or both of the March and July occurrences?

   YES ___

   NO X

3. Do you find that AVCO-Lycoming was at fault, either wholly or in part, under any of the rules of law which I have explained to you for either or both of the March and July occurrences?

   YES __

   NO X

4. Do you find that Aerospatiale Helicopter Corporation and/or its parent company was at fault, either wholly or in part, under any of the rules of law which I have explained to you for either or both of the March and July occurrences?

   YES __

   NO X

5. Do you find that the pilot, John Airington, was at fault, either wholly or in part, under any of the rules of law which I have explained to you for either or both of the March and July occurrences?

YES__

NO X

6. What amount, if any, do you find will fully and fairly compensate Michael Duhon for the injuries and losses which he sustained in one or both of the occurrences? For any item which you do not feel that an award is due, place a "O" in the blank.

(A) Past and future physical pain and suffering: $ 17,250.00

(B) Past and future mental pain and suffering: $ 17,250.00

(C) Disability and loss of enjoyment of life: $ 0

(D) Medical expenses, past and future: $ 57,500.00

(E) Loss of earnings and loss of earning capacity, past and future; $ 20,000,00

7. What amount, if any do you award to Mrs. Duhon for loss of consortium:

$ 10,000.00

8. Do you find that one or more of the defendants acted grossly negligent or showed a willful disregard for the safety of Michael Duhon, which caused his injuries and losses?

YES__

NO X

If your answer to question 8 above is no, go no further.

After receiving this verdict, the result of three hours of deliberation, the trial judge, not being certain that the jury meant to find damages but no liability, told the jury that he was not sure they intended this result, and sent them back to reconsider. Returning after this reconsideration, which took another 45 minutes, the jury told the court that that was, indeed, their verdict.

WHAT THE TRIAL JUDGE DID

At the conclusion of the presentation of the evidence, before the case was submitted to the jury, all parties moved for directed verdicts on the issues of liability. The trial judge denied the motions of the defendants, but took the plaintiffs' motions under advisement, explaining that he had not been able to look at the voluminous exhibits in evidence, and that he needed to do so before considering the motions. Some two months after the jury verdict, the trial judge directed verdicts against AVCO-Lycoming, the manufacturer, and PHI, the custodian of the aircraft. The court cited La.C.C. art. 2317 as authority for both directed verdicts.

As to Aerospatiale, the trial judge found that there

was no evidence the engine that failed was the same engine put there by the manufacturer of the helicopter, and that there was evidence that the engines were frequently moved and replaced when service or repairs were necessary. As to this defendant he denied the motion for a directed verdict.

THE LIABILITY ISSUES

PHI

On this appeal all parties treat the trial judge's directed verdicts, rendered pursuant to La. C.C.P. art. 1810, as judgments notwithstanding the verdict, as provided by La.C.C.P. art. 1811. We will do the same for it makes no difference what we call them: the standard for determining the propriety of granting a judgment notwithstanding the verdict is the same as used to determine whether a directed verdict should be granted. The standard is: after considering all of the evidence in the light and with all reasonable inferences most favorable to the party opposed to the motion, if the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motion is proper. *Rougeau v. Commercial Union Insurance Co.*, 432 So.2d 1162 (La.App. 3d Cir. 1983). writ denied, 437 So.2d 1149 (1983).

As to PHI, however, we do not review by the "reasonable men" standard; rather, we will disregard the trial court's judgment N.O.V., as well as the jury's finding of no negligence, and make an independent determination of whether or not the plaintiff proved that PHI was at fault in accordance with applicable law. The reasons why we feel compelled to disregard both the judge's and the jury's findings in this case are explained as follows.

[1,2] The liability of PHI is controlled by the general maritime tort law. A helicopter ferrying passengers from shore to an artificial island is engaged in a function traditionally performed by waterborne vessels, and if it is involved in an accident on the high seas, admiralty jurisdiction is invoked. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986). The plaintiffs here are in state court because of the "saving to suitors" clause of 28 U.S.C.A. § 1333. Plaintiffs are in state court seeking a remedy for a wrong, but if the remedy sought under state law alters or conflicts with the maritime or admiralty law which establishes the substantive rights of the parties, then the federal substantive admiralty or maritime law controls. *Hebert v. Diamond M. Co.,* 367 So.2d 1210 (La.App. 1st Cir.1978).

[3] The question before us is whether the strict liability remedy of La.C.C. art. 2317 is available to the plaintiffs in this admiralty case.

We decide that it is not. Under La.C.C. art. 2317 and the jurisprudence interpreting it, legal fault is imposed on the custodian of a thing for damage caused by a defect in the thing, ragardless of any personal negligence by the custodian. *King v. Louviere,* 543 So.2d 1327 (La.1989). The strict liability or legal fault that arises from La.C.C. art. 2317 is more than a rebuttable presumption of negligence. *Halphen v. Johns-Manville Sales Corp.* 484 So.2d 110 (La.1986). The custodian cannot be absolved from his strict liability even if he proves that he did not know and could not have known of the unreasonable risk to others. *Id.* at 116.

[4] We have been unable to find anything in the general maritime tort law the same as La.C.C. art. 2317. The warranty of seaworthiness and the liability that at-

taches to the breach thereof may have some kindred features, but it is applicable only to seamen; there is no implied warranty of seaworthiness extended to passengers. *Complaint of Compagnie Generale Transatlantigue,* 392 F.Supp 973 (U.S. D.C., Puerto Rico, 1975). Instead, a carrier's duty when transporting passengers requires him to exercise a very high degree of care. *Moore-McCormack Lines, Inc. v. Russak,* 266 F.2d 573 (9th Cir., 1959). Merely because an accident occurs, however, a carrier does not become liable to a passenger. *Katz v. Cie Generale and Transatlantigue,* 271 F.2d 590 (4th Cir. 1959). A passenger may recover personal injury damages only if he proves the fault or negligence of a carrier. *Counts v. Lafayette Crewboats, Inc.,* 622 F.Supp. 299 (W.D.La.1983).

[5] Since the general maritime tort law requires proof of negligence by a passenger who sues a common carrier, and La.C.C. art. 2317 does not require proof of negligence, there is a substantive conflict affecting the rights of the parties, and the maritime law must prevail.

[6] The evidence concerning the liability of PHI for the March 31 accident was aimed at establishing two theories. First, it was shown that something was wrong with the engine. Second, an effort was made to establish pilot error on the part of Airington in the descent, causing a hard landing. Since the jury made a finding that Airington was not at fault, and this finding is not assigned as error by the plaintiffs on appeal, it is unnecessary to discuss whether PHI might be liable for the negligence of its pilot. This leaves for consideration only whether the failure of the engine was caused by any negligence on the part of PHI, or whether PHI had knowledge of its propensity to fail and flew it in disregard of that knowledge.

The expert Robert K. Phillips reviewed the engine

records of this engine from the time it was installed until the time of the accident, and gave testimony that from those records the engine had always performed normally, and that there was "no trend that would have been apparent [or] anything that would indicate something was going to happen."

The expert Semprebon praised PHI's engine maintenance at its shop. The separation of the blade, according to Semprebon, was not due to over stress by the pilot or lack of maintenance on the part of PHI.

The substance of the testimony of these experts was that nothing PHI did in the way of maintenance or operation caused the blade to fail, and there was nothing that it could have done to prevent it. Nor was there any evidence that PHI was aware that such a problem might occur, since it had no prior experience with such failures.

Plaintiff's argue that the bad record of LTS 101 was so well known throughout the aviation industry that it was gross negligence, to say nothing of ordinary negligence, for PHI to carry passengers in an aircraft powered by that engine. The testimony does not support a finding that the LTS 101 was considered unsafe in the aviation industry. No witness said so. There was no evidence that it had ever been grounded by the F.A.A. or the N.T.S.B. The engine had some early developmental problems but the evidence is that the PHI people were not aware of this until after March 31, 1983.

Our evaluation of the evidence in this record reveals that no proof, not even of the "smallest" or slightest negligence, exists against PHI. Nothing short of grounding its entire fleet of AS350D aircraft would have exempted PHI from liability, if continuing to fly with the LTS

101 engine on the evidence before us convicts it of negligence rendering it liable under the maritime common carrier laws. On the evidence before us we are not persuaded that PHI by continuing to fly the aircraft acted negligently. The jury, although instructed that PHI's duty was that of ordinary care, reached the same result by finding that PHI was not at fault or negligent. Our disposition of this issue is accordingly consistent with the finding of the jury. We reverse the judgment N.O.V. and reinstate the jury verdict as to this defendant.

AVCO-LYCOMING

[7] The trial judge properly rendered a judgment N.O.V. against AVCO-Lycoming as the manufacturer of a defective product.

As to AVCO-Lycoming the trial judge gave the jury a correct instruction of the law of products liability. Strict products liability is part of the general maritime law. *Vickers v. Chiles Drilling Co.*, 822 F.2d 535 (5th Cir.1987). Louisiana products liability law is for all practical purposes the same as federal maritime products liability law. *Forbes v. A & P Boat Rentals, Inc.*, 689 F.Supp. 625 (E.D.La.1988), p. 629, n. 4. A product is unreasonably dangerous in construction or composition if at the time it leaves the control of its manufacturer it contains an unintended abnormality or condition which makes the product more dangerous than it was designed to be. *Halphen v. Johns-Manville Sales Corp.*, supra, at 114. A manufacturer or supplier who sells a product with a construction or composition flaw is subject to liability without proof that there was any negligence on its part in creating or failing to discover the flaw. *Id.* at 114.

In this case there is no question that AVCO-

Lycoming designed and built the gas producer rotor in the engine. One of the gas producer blades broke causing the engine to fail. The blade broke because of fatigue. Since the experts testified that the stress on the blade could not have been caused by operational or maintenance error, all that is left to explain it is that the blade was defective in either design or construction. Similar blade failures had previously occurred before dampers were installed. AVCO-Lycoming is liable for its defective product. Considering all of the evidence in the case in the light and with all reasonable inferences most favorable to AVCO-Lycoming, we agree with the trial court that the facts and inferences point so strongly and overwhelmingly in favor of the plaintiffs that reasonable men could not arrive at a contrary verdict. The trial court's judgment N.O.V. was proper.

AEROSPATIALE

[8] The trial jury was properly instructed pertaining to the liability of Aerospatiale as manufacturer of the aircraft. The jury found Aerospatiale not liable. The trial judge denied a motion for judgment N.O.V.

As noted by the trial judge in his denial of the motion for judgment N.O.V., and as shown by the documentary evidence, as well as by the testimony, the engine which failed on March 31, 1983, was not the engine in the aircraft at the time of its manufacture or its sale to PHI. The evidence established that the autorotation of March 31 was rendered necessary solely because of the malfunction of the engine, and not because of any defect in the aircraft itself. A manufacturer cannot be liable in a products liability claim where it shows that it did not manufacture or install the component of the product alleged to be defective. *Newman v. General Motors Corp.*, 524 So.2d 207 (La.App. 4th Cir.1988).

PUNITIVE DAMAGES

[9] Punitive damages are available under the general maritime tort law. *In re Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir.1981). Punitive damages may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. *Id.* at 625. Punitive damages are disfavored. *Creamer v. Porter*, 754 F.2d 1311 (5th Cir.1985).

The conduct of AVCO-Lycoming in this case was not such as to justify the imposition of punitive damages.

THE AWARD

[10] At the trial Michael Duhon complained of a herniated cervical disc, damage to the ulnar nerve, a carpal tunnel syndrome, mental pain and suffering, and consequent permanent disability.

The jury awarded him a total of $112,000 in damages. He complains on this appeal that that award was insufficient, particularly the economic loss of only $20,000.

As a meter technician Duhon was earning $13,500 a year in 1983. He testified that during the intervening four years between the accident and the trial he had not been able to work at all. The jury's itemized award to him of only $20,000 in loss of earnings was a clear indication that they did not believe he was disabled to the extent claimed.

There was testimony by plaintiff's treating physicians from which the jury could have concluded that the doctors were not fully informed as to his pre-accident physical condition, and that their attribution of his symptoms to the accident was influenced by an inaccurate

medical history. For example, although he told his doctors that his neck pain, headaches, and insomnia did not begin until after March 31, 1983, the evidence at trial revealed that before that date he had seen a chiropractor, Dr. Robert Earl Lee, over 150 times for the same primary complaints as those asserted in this lawsuit.

Mr. Duhon had also been involved in three accidents before March 31, 1983, and was involved in four more between the helicopter incidents and the trial.

The doctors could not say that his elbow and wrist problems were caused by the unscheduled landings, as ulnar neuropathy and carpal tunnel syndromes may be caused by many things other than trauma. Neck surgery was performed in 1984, but the evidence that Mr. Duhon had been seeing a chiropractor for neck pain for five years before the emergency landings virtually eliminated these incidents as the cause of his neck problem, and cast doubt on whether they aggravated it.

Before an appellate court can disturb a trial court's award of damages, the record must clearly show an abuse of discretion. *Beard v. Republic-Vanguard Insurance Co.*, 509 So.2d 561 (La.App. 3d Cir.1987). Credibility determinations are peculiarly the province of the trier of fact. *Senegal v. George Theriot's, Inc.*, 445 So.2d 137 (La.App. 3d Cir.1984), writ denied, 448 So.2d 114 (1984).

After granting the judgment N.O.V. in this case, the trial judge rendered judgment for the plaintiffs in accordance with the quantum of damages assessed by the jury. The trial judge later denied Mr. Duhon's post-trial motions for a new trial and an additur.

After a thorough review of the record pertaining to

damages, we find no error in these rulings. The award of only $122,000 in total damages was not an abuse of the jury's discretion.

THE EVIDENTIARY RULINGS

1.

[11] The trial court did not err in excluding from evidence the cross-claims, answer to cross-claims, and other federal court pleadings filed by PHI.

In a federal lawsuit the hull insurer filed pleadings on behalf of PHI against AVCO-Lycoming and Aerospatiale, alleging that the engine in the aircraft on July 26, 1983 (when hull damage from wave action occurred), was defective. The plaintiffs wanted to show this pleading to the jury as a judicial admission showing PHI's knowledge that the engine was defective, for punitive damage purposes.

Besides being totally irrelevant to the present case, the allegations were not judicial confessions. A judicial confession, as meant by La.C.C. art. 1853, is an express acknowledgment of an adverse fact. *Howard Trucking Co. v. Stassi,* 485 So.2d 915 (La.1986), cert. denied, 479 U.S. 948, 107 S.Ct. 432, 93 L.Ed.2d 382 (1986). The federal pleadings were not at all an acknowledgment that PHI knew before March 31, 1983, that the LTS 101 engine was defective.

2.

[12] The trial court did not err in excluding from evidence a letter to Frank Lee, PHI's president, from Duhon's employer, Southern Petroleum Laboratories, complaining about the A-Star 350D.

The letter was written on August 1, 1983, after the two autorotation landings in this case. The plaintiffs contend that the letter should have been admitted to impeach Gene Graves, a PHI employee, who testified on cross-examination that Southern Petroleum Laboratories had never expressed any dissatisfaction with the helicopter.

Actually, Gene Graves testified only that he could not himself recall receiving any complaints from Duhon's employer before March of 1983. The letter could not have impeached that testimony and it was properly excluded.

3.

[13] The trial judge recognized plaintiffs' witness, Robert G. Ferry, as an expert helicopter pilot, but refused to qualify him as an expert in helicopter operations and aircraft accident reconstruction. The plaintiffs complain that this was error.

La.C.E. art. 702 provides that a witness qualified as an expert by knowledge, skill, experience, training, or otherwise, may give testimony as an expert. The comments to the article note that broad discretion should be accorded the trial judge in his determination of who should or should not be permitted to testify as an expert.

The witness was extensively examined by both sides as to his qualifications. The trial judge found that he had no experience as an air taxi operator under F.A.A. regulations, and therefore could not qualify as an expert in helicopter operations. He had never attended an aircraft accident investigation school, was not an aircraft mechanic, did not have an engineering degree, had flown the A-Star for only one hour in his career, and he had no manufacturing or design experience in aircraft.

The trial judge did not abuse his discretion in refusing to qualify the witness in these respects. Further, we doubt that the witness' testimony in those areas could have assisted the jury in understanding the evidence or determining any fact in issue.

4.

Plaintiffs wanted to introduce into evidence certain articles concerning the A-Star helicopter and the LTS 101 engine that appeared in the commercial magazines "Rotor & Wing International" and "Aviation Weekly." The articles were critical of the aircraft and the engine.

The stated purpose for the introduction of the articles was for the impeachment of witnesses on cross-examination. The admissibility of the articles was predicated on their being self-authenticating documents under the Louisiana Code of Evidence.

Every witness questioned as to his knowledge of the articles declared his familiarity with the magazines but his inability to recollect whether he had ever read the articles. Thus there was nothing to impeach. Moreover, most were written after the incidents in question.

[14] As to their self-authentication, La.C.E. art. 902(6) provides that extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to printed materials purporting to be newspapers or periodicals. This does not exempt the offerings from passing the usual tests for admissibility. The trial court properly refused to admit the articles in evidence. The only basis for allowing them in evidence would have been to establish the truth of the matters asserted therein. Their authors were not produced for cross-examination at trial,

and thus the articles were no more than inadmissible hearsay. *Jennings v. Allstate Insurance Co.*, 273 So.2d 534 (La.App. 1st Cir.1973).

THE DENIAL OF A NEW TRIAL

[15] Finally, the plaintiffs complain that a new trial should have been granted, and that we should now order one, because of the discovery since the trial of evidence important to the cause, which the parties could not, with due diligence, have obtained before or during the trial. La.C.C.P. art. 1972(2).

They refer to 45 service bulletins and airworthiness directories which allegedly were not produced during discovery despite requests for production. In their brief, plaintiffs state that they obtained these documents after trial by means of a telephone call from the F.A.A.

At the hearing on the motion for a new trial, the defendants responded that they had in fact produced all of these documents. Evidently the trial judge agreed with defendants, because the motion was denied.

Because the alleged incomplete response to discovery took place over two years before trial, it would be next to impossible at this late date to reconstruct events and determine whether the questioned documents were, or were not, made available. The trial judge was in a far better position to evaluate the grounds for this motion than are we, and we find no error in his ruling.

For the foregoing reasons, the judgment of the trial court finding PHI liable to the plaintiffs herein and assessing that defendant with a portion of the costs is reversed. In all other respects the judgment is affirmed. Plaintiffs

will pay the costs of this appeal.

REVERSED IN PART; AFFIRMED IN PART; AND RENDERED.

APPENDIX K

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

CA/88-1365

MICHAEL J. GREEN
Plaintiff-Appellant

UNITED STATES FIDELITY
& GUARANTY COMPANY
Intervenor-Appellant

VERSUS

INDUSTRIAL HELICOPTERS, INC.
Defendant-Appellee

DOUG WRIGHT
Defendant-Appellee

ON APPEAL FROM THE 15TH JUDICIAL DISTRICT
COURT, LAFAYETTE PARISH, LOUISIANA
HONORABLE DON AARON, JR.

APPLICATION FOR REHEARING
ON BEHALF OF APPELLEE
INDUSTRIAL HELICOPTERS, INC.

Mr. Charles R. Sonnier
Mr. Fred W. Davis
SONNIER, HEBERT, CABES
& HEBERT
Magdalen Centre
Two South Magdalen Square
P.O. Drawer 700
Abbeville, La 70511-0700

ATTORNEYS FOR APPELLEE,
INDUSTRIAL HELICOPTERS, INC.

A-142

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

CA/88-1365

MICHAEL J. GREEN

Plaintiff-Appellant

UNITED STATES FIDELITY
& GUARANTY COMPANY

Intervenor-Appellant

VERSUS

INDUSTRIAL HELICOPTERS, INC.

Defendant-Appellee

DOUG WRIGHT

Defendant-Appellant

ON APPEAL FROM THE 15TH JUDICIAL DISTRICT
COURT, LAFAYETTE PARISH, LOUISIANA
HONORABLE DON AARON, JR.

APPLICATION FOR REHEARING
ON BEHALF OF APPELLEE
INDUSTRIAL HELICOPTERS, INC.

NOW INTO COURT, through undersigned counsel, comes Appellee, **INDUSTRIAL HELICOPTERS, INC. ("INDUSTRIAL" or "APPLICANT")**, who respectfully represents to this Honorable Court, as follows:

APPLICATION FOR REHEARING

1.

As will be noted by reference to the record of the proceedings in this Court, the Honorable Court of Appeals, Third Circut, issued its judgment in this matter on April 18, 1990, amending the decision of the Trial Court to increase Plaintiff's lost wages, as well as affirming the portion of the Trial Court decision finding **APPLICANT** liable under Civil Code Article 2317, and further, remanding for hearing to determine the validity of the deposit of funds in the court registry in an effort by **APPLICANT** to prevent the accrual of continued interest on the judgment amount.

2.

APPLICANT respectfully moves this Honorable Court to grant a rehearing of this appeal in accordance with the provisions of Rule 2-18.1 of the Uniform Rules - Courts of Appeal.

SPECIFICATION OF APPLICANT'S CONTENTIONS

3.

APPLICANT respectfully shows that this Honorable Court erred in amending and affirming the decision of the Trial Court.

1) **DEFENDANT, INDUSTRIAL HELICOPTERS IS NOT LIABALE TO PLAINTIFF UNDER A THEORY OF STRICT LIABILITY UNDER LOUISIANA CIVIL CODE ARTICLE 2317;**

This Court has affirmed the Trial Judge in finding **INDUSTRIAL** strictly liable for damages sustained by the Plaintiff under Louisiana Civil Code Article 2317. The facts of the instant decision are analogous to the facts of *Duhon vs. Petroleum Helicopters, Inc.*, 554 So.2d 1270 (La. App. 3rd Cir. 1989), *rehearing denied, writs denied* in which another panel of this court found Article 2317 **inapplicable** to a helicopter owner under similar facts.

The factual analogies between *Duhon* and Green are overwhelming. We contend the legal result should be the same.

In *Duhon*, a helicopter owned by PHI was transporting Duhon, employed by Southern Petroleum Labs as a meter technician, from shore to an offshore platform in the Gulf "well beyond the Louisiana coast." Green, also a meter technician, was being transported to a rig ninety (90) miles offshore (Tr. p. 696). The helicopter in *Duhon* also lost power and descended to the ocean in what the FAA called an "incident," similar to Green's accident. In *Duhon*, the engine failed because the blade on the gas-producer rotor of the engine failed as a result of vibrator stress.

The Trial Judge in Green found that the sole and proximate cause of the engine failure was the mechanical failure of the aircraft's governor device which controlled the engine RPM's (Tr. p. 618; Appeals Court decision, p. 4). This was a sealed unit which could not be maintained

independently by **INDUSTRIAL**, and a mechanic could not visibly inspect the interior of the governor (Tr. p. 978).

The *Duhon* court found that the helicopter's role in transporting passengers in this manner was within the admiralty jurisdiction of the court, and maritime law required proof of negligence in order to recover from a common carrier and this principle prevailed over the state's strict liability remedy for damages caused by things in custody under Article 2317. The Trial Judge in Green found defendant liable for the mechanical failure as a defect under 2317 (Tr. p. 619) as did the Appeals Court in its decision at pages 3-4, despite the finding of the Trial Judge's Reasons for Judgment that "Industrial Helicopters was not negligent in the inspection of its helicopter and that it was not possible for the defendant to discover the defective governor since no problem of this nature had been reported" (Tr. p. 619), and the pilot error was not a factor in the crash (Tr. p. 618).

Also similar to the instant case, in *Duhon* no evidence showed that the helicopter owner or the operator were negligent in maintenance or operation of the helicopter.

The *Duhon* court held that the state strict liability remedy for damages caused by things in custody was not available to the injured helicopter passenger in such cases. The Trial Judge in Green, however, and affirmed by this Honorable Court found that, although the Plaintiff failed to prove any negligence of Industrial Helicopters in the care and operation of the helicopter, the defendant was nonetheless liable for any damages caused by a defective

thing in its care, custody or control under Civil Code Article 2317 (Tr. p. 619).

If 2317 has previously been held not to apply to facts which are similar to the situation before this panel, it does not make Article 2317 applicable to Green any more than Mr. Duhon. The legal principles and analogous facts as enunciated in *Duhon* should apply to Mr. Green's claims regardless of Duhon's suit being brought under state law and the "saving to suitor's clause" of the Admiralty Jurisdiction Statute. We suggest, therefore, that in light of the precedent established in the circuit via *Duhon* that reconsideration be given to the Appeals Court's affirmation of the Trial Judge's decision applying 2317. **APPLICANT** contends this is adequate grounds for rehearing and reversal of the Trial Court's decision **as a matter of law.**

2) **THE TRIAL COURT DID NOT COMMIT MANIFEST ERROR IN ITS AWARD OF PAST LOST WAGES.**

This Honorable Court failed to give credence to the Trial Judge's assessment of economic loss which, although not specific, must have considered that Green chose to go to trade school and not mitigate his damages, when he was capable of returning to work. The evidence showed that Dr. Heard said he could return to work in May of 1987 (Tr. 1074).

We ask the Appeals Court to reconsider a review of the Trial Judge's assessment of the record in light of the medical evidence indicating that Green could have been employed but simply chose to forego same. He should not now benefit from a windfall award of lost wages and a generous compensation carrier under those circumstances. The Trial Judge found the Plaintiff was capable of work-

ing after the accident and currently had a secure job (Tr. p. 623). The Trial Judge partially discounted Plaintiff's wage claim using what Green could have made even at a lower rate during his injury period before trial.

The Appeals Court decision served to reward the worker's compensation carrier for being a benevolent donor of benefits when its own doctor indicated as early as May, 1987, that Mr. Green was capable of going back to work at his previous occupation (Dr. Heard's testimony, Tr. p. 1074). The carrier's continuation of payments should not necessarily be determinative in assessing the economic damages of Mr. Green. To the contrary, with all due respect to the Court, **APPLICANT** contends that the increase in the award of past lost wages was more a mechanism to circumvent this Honorable Court from having to decide whether or not *Rooks vs. Chicola*, 514 So.2d 7 (La. 1987) applies to this case.

APPLICANT contends the lower court did not abuse its discretion but merely took into consideration numerous factors in making the economic damage award including the medical evidence, the fact that Green went to trade school and was still working at a time in a depressed economy. This Honorable Court has determined the evidence is not sufficient to award future damages. We think that in light of the limited disability as evidenced in the record the entitlement to past wages should be affirmed as per the Trial Court's decision. Factual conclusions of the trial court must be given great weight by a reviewing Court. *Roussel vs. Colonial Sugars Co.*, 318 So.2d 37 (La. 1975). *Vascoca vs. Singletary*, 434 So.2d 597 (La. App. 3rd Cir. 1983).

3) **A REMAND TO DETERMINE THE VALIDITY OF THE DEPOSIT OF FUNDS IN THE REGISTRY OF THE COURT IS UNNECESSARY.**

Although this Court has remanded the issue concerning the deposit of funds in the registry of the Court, we ask the Court to reconsider its ruling in light of the Appellant's withdrawal of funds from the Court's registry soon after its deposit, without notification to Defendant. All the concerns of *LaGraize vs. Bickham,* 391 So.2d 1185 (La. App. 4th Cir. 1980) and *Gagnet vs. Zummo,* 487 So.2d 721 (La. App. 5th Cir. 1986), cited in the Appeals Court decision were met in this instance due to the Plaintiff's withdrawal of the funds and a hearing on that issue would not be necessary.

WHEREFORE, this Honorable Court should grant re-hearing of this matter, and upon oral argument of same, issue a decree that reverses the Trial Court decision entirely or, alternatively, reinstates the judgment of the Trial Court with regard to economic damages and past lost wages and recalls the remand for rehearing on the validity of the deposit of funds in the Court's registry.

Respectfully submitted,

SONNIER, HEBERT, CABES
& HEBERT

BY: /s/ Charles R. Sonnier

CHARLES R. SONNIER #12260
FRED W. DAVIS #1817
Two South Magdalen Square
P. O. Drawer 700
Abbeville, LA 70511-0700
(318) 893-5973
ATTORNEYS FOR APPELLEE
INDUSTRIAL
HELICOPTERS, INC.

CERTIFICATE

I HEREBY CERTIFY that a copy of the above and foregoing Application for Rehearing on behalf of Appellee, Industrial Helicopters, Inc., has been served upon all known counsel in this matter by placing a copy of same in the United States mail, postage prepaid and properly addressed, prior to the submittal of the original to this Honorable Court.

Abbeville, Louisiana, this 2nd day of May, 1990.

/s/ Charles R. Sonnier
CHARLES R. SONNIER

APPENDIX L

NUMBER 88-1365

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

APR 18, 1990

MICHAEL J. GREEN
Plaintiff-Appellant

UNITED STATES FIDELITY
& GUARANTY COMPANY
Intervenor-Appellant

Versus

INDUSTRIAL HELICOPTERS, INC.
& DOUG WRIGHT
Defendants-Appellees

On Appeal from the Fifteenth Judicial District Court, Parish of Lafayette, State of Louisiana; Honorable Don Aaron, Jr. Judge, Presiding

Before: FORET, STOKER, and LABORDE, Judges.

LABORDE, Judge.

Plaintiff, Michael J. Green, brought this action for injuries he sustained when a helicopter he was riding in crashed landed in the Gulf of Mexico. Made defendants herein are Industrial Helicopters, Inc. (Industrial

Helicopters), the owner of the helicopter, and Doug Wright, the pilot. United States Fidelity & Guaranty Company (USF&G), the worker's compensation carrier of the plaintiff's employer, intervened in the suit, seeking reimbursement for all compensation benefits and medical payments it has paid to the plaintiff. After a trial on the merits, the trial judge found in favor of the plaintiff and against the defendant. The judgment also recognized USF&G's intervention; however, the intervenor's recovery was limited to the plaintiff's award for economic loss and medical expenses. Plaintiff and intervenor now appeal. Defendants filed an answer to appeal, requesting that this court reverse the judgment in all respects. We amend the decision of the trial judge to increase the economic damage award to the plaintiff and also to increase the amount the intervenor is entitled to recover on its intervention. Additionally, the judgment is amended to allow for legal interest on the intervenor's recovery. The trial judge's decision is affirmed as amended. Finally, we remand this case to the trial court for a contradictory hearing on the defendant's Motion for Deposit of Money Into the Registry of Court and Cancellation of Judgment.

FACTS

Plaintiff was employed by Southern Petroleum Laboratories as a fluid meter technician. This position involved the installing, maintaining and repairing of fluid metering devices on offshore production platforms. Southern Petroleum Laboratories had contracted with Industrial Helicopters to transport its workers out to the platforms.

On November 26, 1984, a helicopter owned by Industrial Helicopters and operated by Doug Wright picked up the plaintiff in Milton, Louisiana and proceeded out

towards the plaintiff's work site in the High Island section of the Gulf of Mexico, off the Texas coast. En route to the area, the helicopter stopped for refueling at Exxon's West Cameron 616 platform. The refueling process was completed and the helicopter took off from the platform. Shortly after lifting off, the helicopter experienced mechanical trouble and was forced to make an emergency landing in the Gulf.

Not long after the helicopter landed in the Gulf, a rescue capsule was launched from the Exxon platform. Upon reaching the helicopter, Exxon personnel assisted the pilot and the plaintiff into the rescue craft. Both men were transported to the Exxon platform, and then, eventually, to land.

The plaintiff claims that he suffered injuries to his ribs, chest, neck, shoulder and jaw as a consequence of the collision. For the three and one-half years between the date of the accident and the date of the trial of this matter, the plaintiff was under medical care from a variety of doctors and dentists. The evidence also indicates that one month after the accident, the plaintiff returned to light duty work with Southern Petroleum Laboratories. He was employed by Southern Petroleum Laboratories for approximately five months at the light duty position, when in May of 1985, he was laid off. The apparent reason for this lay off was that his employer ran out of light duty work for him to perform. After the plaintiff was terminated by his employer, he applied for and received disability benefits pursuant to the Longshore and Harbor Workers' Compensation Act. The plaintiff later enrolled in an electronics course at the Lafayette Regional Trade School. Upon completion of his training in August of 1987, he obtained full-time employment with MASCO, Inc. as an electronic solid state component technician.

Plaintiff, intervenor and defendant, Industrial Helicopters, have appealed the decision of the trial court, each raising several specifications of error.

LIABILITY OF PILOT DOUG WRIGHT

In his Reasons for Judgment, the trial judge stated, "[i]n the Court's opinion, Mr. Wright's handling of this emergency situation was extraordinary. Accordingly, the Court finds that pilot error was not a factor in this crash." We agree, and find no liability on the part of Mr. Wright.

STRICT LIABILITY OF INDUSTRIAL HELICOPTERS

The trial judge found the defendant, Industrial Helicopters, to be strictly liable for the damage sustained by the plaintiff under Louisiana Civil Code Article 2317. Industrial Helicopters argues that this decision is manifestly erroneous.

Louisiana Civil Code Article 2317 provides:

> "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody...."

In Shipp v. City of Alexandria, 395 So. 2d 727, 728-729 (La. 1981), the Louisiana Supreme Court stated the following regarding the applicability of art. 2317:

> "We have described the legal foundation for imposing liability under art. 2317 in the following terms:

> When harm results from the conduct or defect of a person or thing which creates an unreasonable risk of harm to others, a person legally responsible under these code articles for the supervision, care, or guardianship of the person or thing may be held liable for the damage thus caused, despite the fact that no personal negligent act or inattention on the former's part is proved. The liability arises from his legal relationship to the person or thing whose conduct or defect creates an unreasonable risk of injuries to others.

> Jones v. City of Baton Rouge, 388 So. 2d 737, 739 (La. 1978), citing Loescher v. Parr, [324 So. 2d 441, 446 (La. 1975)]. An injured party seeking damages under art. 2317 need not prove negligence, that is, that any particular act or omission on the part of the defendant caused his injuries. He must only prove that the thing which caused the damage was in the care or custody of the defendant, that the thing had a vice or defect, that is, that it occasioned an unreasonable risk of injury to another, and that his injury was caused by the defect. Once these elements are proven the custodian can escape liability only by showing that the harm was caused by the fault of the victim, by the fault of a third person, or by an irresistible force. Jones v. City of Baton Rouge, supra; Loescher v. Parr, supra."

Industrial Helicopters contends that the plaintiff failed to prove the requisite elements of an art. 2317 action. We disagree.

It is undisputed that Industrial Helicopters owned the helicopter in which the plaintiff was a passenger on the crash. Thus, it is clear that the helicopter was in the care and custody of Industrial Helicopters.

We also find that the plaintiff proved that there was a defect in the helicopter, which created an unreasonable risk of harm to the occupants. Both the pilot and a mechanic employed by the defendant, Craig Issac, testified at trial that the crash was caused by a malfunction of the helicopter's governor. This testimony was uncontroverted at trial. The evidence indicates to this court that the failure of the aircraft's governor caused it to lose altitude and eventually crash in the Gulf.

Finally, we determine that the plaintiff proved by a preponderance of the evidence that his injuries were caused by the defect in the helicopter. The plaintiff stated at trial that the jolt of the helicopter's impact with the water caused a strain on his neck and shoulder. He also stated that during the rescue operation he banged his jaw on the outer surface of the rescue vessel. Dr. Thomas C. Laborde, a specialist in physical medicine and rehabilitation, who treated the plaintiff for his neck and shoulder pain, stated at trial that the injuries to these areas could have been caused by the crash. Additionally, Dr. Randolph B. Malloy, an oral and maxillofacial surgeon who has treated the plaintiff for tempromandibular joint (TMJ) dysfunction, testified that the plaintiff's TMJ problems were most likely caused by the accident. The defendant argues that the plaintiff's TMJ dysfunction is the result of preaccident causes; however, after a thorough review of the evidence, we find that the TMJ problems were a direct result of the accident.

Accordingly, we determine that the plaintiff has proved by a preponderance of the evidence that the defendant is strictly liable for the damage sustained by the plaintiff under LSA-C.C. art. 2317.

As a defense to the imposition of liability under art.

2317, the defendant alleges that the Exxon personnel involved in the rescue operation were negligent in carrying out the rescue operation, that their negligence caused the plaintiff's injuries and that such negligence was an intervening cause, which relieved defendant of liability for the plaintiff's injuries. Third party fault is a judicially recognized defense to strict liability action. *Shipp,* supra; Jones v. City of Baton Rouge, 388 So. 2d 737 (La. 1978). Although the plaintiff testified that he injured his jaw during his climb into the rescue craft, there is not sufficient evidence to indicate that the harm which befell the plaintiff resulted from negligence on the part of the rescuers. This defense has no merit.

QUANTUM

Both the plaintiff and defendant appeal the trial judge's damage award. Before we discuss their respective claims, it is necessary to point out that an appellate court can disturb a quantum award only if the record clearly reveals that the trier of fact abused its much discretion in making the award. Bitoun v. Landry, 302 So. 2d 278 (La. 1974); Alexander v. Leger, 423 So. 2d 731 (La. App. 3d Cir. 1982), *writ denied,* 430 So. 2d 75 (La. 1983).

The defendant contends that the trial judge abused his discretion in awarding the plaintiff $40,000.00 in general damages and $15,000.00 in future medical expenses. We have carefully reviewed the evidence pertaining to these awards, and find them not to be an abuse of the trial judge's discretion.

The plaintiff, on the other hand, would have this court increase the trial judge's economic damage award. The trial judge awarded the plaintiff $25,000.00 in economic damages, which figure represents both his past

and future lost wages. The plaintiff claims that his lost wages through the date of trial were $66,400.00 and that his loss of future wages would amount to between $150,000.00 and $190,000.00. We agree that there should be an increase in the plaintiff's past lost wage award, but we do not think he is entitled to any damages for loss of earning capacity.

The trial judge was not specific as to what portion of the $25,000.00 economic damage award constituted past lost wages, nor did the trial judge explain what evidence he took into consideration in reaching the amount of the plaintiff's lost wages. The evidence presented in the record establishes that the plaintiff is entitled to a greater amount than $25,000.00 (which the trial court awarded for both past and future lost wages) for past lost wages alone. Therefore, this court finds that the trial judge abused his discretion in making the past lost wage award.

Once a reviewing court makes the finding that the record clearly establishes that the lower court abused its discretion in making an award, it may then modify the award. However, the appellate function in reviewing quantum is limited to raising inadequate awards to the lowest amount the lower court could have reasonably awarded, or lowering excessive awards to the highest amount the lower court could have reasonably awarded. It is never appropriate for a reviewing court having found that the trial court abused its discretion, simply to decide what it considers an appropriate award on the basis of the evidence. Reck v. Stevens, 373 So. 2d 498 (La. 1979); Coco v. Winston Industries, Inc., 341 So. 2d 332 (La. 1976); Tate v. Trinity Universal Insurance Company, 465 So. 2d 235 (La. App. 3d Cir. 1985).

The plaintiff claims that he is entitled to $66,400.00 in past lost wages. Lost wages need not be proven with

precision, reasonable certainty is the standard. Finley v. Bass, 478 So. 2d 608 (La. App. 2d Cir. 1985). We find that this figure is a true representation of the plaintiff's lost wages, and is, therefore, the lowest amount that the trial judge could have awarded the plaintiff for his past wage claim.

The plaintiff would also have this court increase the trial judge's award for loss of earning capacity. Conversely, the defendant would have us reduce it or eliminate it altogether. As was previously mentioned, the trial judge awarded the lump sum of $25,000.00 for both past and future lost wages. The plaintiff argues that this award consitutes an abuse of the trial court's discretion and seeks to have it increased to between $150,000.00 and $190,000.00. We believe the amount claimed by the plaintiff for future lost wages is not substantiated by the record. Furthermore, we find that the trial court abused its discretion in awarding any amount for future lost wages because the plaintiff has not proved by a preponderance of the evidence that he is entitled to such an award.

A plaintiff who seeks to recover for loss of earning capacity must prove the extent of his injuries resulting from the accident. He also has the burden of proving that the injuries he sustained have incapacitated him from, in the future, doing work of a reasonable character, that is, work for which he was fitted by training and experience, of the same or similar kind in which he was engaged at the time of the accident. Viator v. Gilbert, 253 La. 81, 216 So. 2d 821 (1968); Chaney v. Our Lady of Fatima Catholic Church, 391 So. 2d 501 (La. App. 3d Cir. 1980).

The medical evidence presented by the plaintiff does not clearly establish that the plaintiff cannot perform work of similar character to his former occupation. The plaintiff

offered the testimony of several of his treating physicians, and although all of them stated that he has some degree of pain or discomfort, not one of them testified as to whether the plaintiff had any residual disability or whether he would necessarily be restricted in his occupational activities in the future. Dr. Laborde, the physician who treated the plaintiff primarily for his neck and shoulder pain, testified that he did not initially restrict the plaintiff's activities, but that later in his treatment of the plaintiff, he recommended that the plaintiff avoid repetitive bending, stooping or lifting, being in one position for longer than one hour, lifting weight of over twenty-five pounds and exposure to vibrational stresses. Dr. Laborde did not state how long these recommended restrictions were to last, nor did he state whether he believed that the plaintiff had any permanent impairment which would preclude him from performing certain types of jobs.

In view of the lack of evidence as to this item, any award for loss of future income in the instant case would be totally speculative and unsupported by the record. Therefore, we find that the trial court abused its discretion in awarding any future lost wages to the plaintiff.

INTERVENOR'S RECOVERY

The intervenor, USF&G, argues that the trial judge erred in limiting its recovery to the plaintiff's awards for economic damages and medical expenses. Presumably, the trial judge limited the intervenor's recovery under the authority of the Louisiana Supreme Court's decision in Brooks v. Chicola, 514 So. 2d 7 (La.1987). The court in *Brooks* held that an employer or its worker's compensation carrier is not entitled to recover reimbursement or future credit from the employee's award of general damages in a suit against a third party tortfeasor. The intervenor

argues that it has paid compensation benefits pursuant to the Federal Longshore and Harbor Workers' Compensation Act, and not under the Louisiana Workers' Compensation Act, and that the *Brooks* case is not applicable to the Federal Act. We find it unnecessary to address this issue, as the intervenor should be able to recover its full claim from the plaintiff's augmented past lost wage award and the award for medical expenses. Indeed, since this court increased the plaintiff's past lost wage award, there should be no need for the intervenor to look to the plaintiff's general damage award for its reimbursement. Accordingly, we hold that the intervenor is entitled to recover the full $66,485.38 from the plaintiff's past lost wage award and the award for medical expenses.

INTEREST ON THE INTERVENOR'S RECOVERY

Intervenor points out that the judgment awarding it reimbursement for benefits paid to the plaintiff failed to include a provision for legal interest. Intervenor is entitled to legal interest on the amount paid to the plaintiff. That amount includes interest on all amounts paid as of the date of intervernor's demand, together with interest on any amounts paid after judicial demand, until such time as the judgment becomes final. Breaux v. Roy Young, Inc., 397 So. 2d 1384 (La. App. 3d Cir. 1981); Willis v. Stauffer Chemical Co., 349 So. 2d 1390 (La. App. 3d Cir.), *writ denied*, 352 So. 2d 1047 (La. 1977).

INTEREST ON THE PLAINTIFF'S RECOVERY

The final issue on appeal is raised by the plaintiff and concerns the suspension of judicial interest. A couple of months after the conclusion of the trial on this matter, the defendant sought to terminate the accumulation of legal interest on the amount of the judgment against it through the filing of a Motion and Order for Deposit of Money Into

the Registry of Court and Cancellation of Judgment. The order requested the Clerk of Court of Lafayette Parish to deposit the sum of $130,048.83 into the Registry of the Court. This sum allegedly represented the amount of the judgment and accrued interest up through the time it was tendered to the plaintiff and intervenor. The trial judge, without contraditory hearing, signed the order on September 26, 1988.

Although there is limited jurisprudence on this issue, two other circuits have allowed such depository procedures. See Gagnet v. Zummo, 487 So. 2d 721 (La. App. 5th Cir. 1986); LaGraize v. Bickham, 391 So. 2d 1185 (La. App. 4th Cir. 1980). Both cases held that a defendant, who is cast in judgment, may deposit the full amount of the judgment into the Registry of the Court, together with the accrued costs and interests and be relieved of added costs and interest in the event that the plaintiff appeals. In the *LaGraize* case, our brethren in the Fourth Circuit stated that for a party to utilize this procedure, the following conditions have to be met:

> "There first must be a tender to and refusal to accept by the judgment creditor. The tender and/or the deposit must be for the full amount of the judgment, including costs and interest. It must be unconditional and constitute a complete waiver of any future defense as to liability on the part of the judgment debtor. Acceptance of the tender and/or withdrawal of the funds by the judgment creditor(s) is without prejudice to any of its (their) rights to appeal as to quantum. In the event of an increase in quantum on appeal, the judgment debtor is liable for all additional costs together with legal interest on the amount of the increase from date of judicial demand until paid."

LaGraize at 1190-1191. Since the defendant's motion would have had to be supported by proof that the *LaGraize* conditions were met, the trial judge erred in granting the motion ex parte. LSA-C.C.P. art. 963; State v. Williams, 536 So. 2d 1312 (La. App. 2d Cir. 1989); Conner v. Conner, 481 So. 2d 639 (La. App. 1st Cir. 1985). Therefore, we remand to the trial court to hold a contradictory hearing on the defendant's motion with instructions to the trial judge to grant the motion only if he finds the *LaGraize* conditions to be met by the defendant.

For the above and foregoing reasons, the judgment of the trial court is amended and affirmed, increasing the plaintiff's past lost wage award to $66,400.00 and eliminating any award made for future lost wages.

The plaintiff's total award is as follows:

General Damages	$ 40,000.00
Past Lost Wages	$ 66,400.00
Past Medical Expenses	$ 18,747.75
Future Medical Expenses	$ 15,000.00
TOTAL AWARD	$140,147.75

We also amend the trial court's judgment to allow the intervenor full recovery of its intervention or $66,485.38. Furthermore, plaintiff and intervenor are entitled to legal interest on their respective awards from date of judicial demand until paid. This case is remanded for reasons stated hereinabove. Costs are to be borne 2/3 by the defendant and 1/3 by the plaintiff.

AFFIRMED AS AMENDED.

REMANDED FOR CONTRADICTORY HEARING ON THE DEFENDANT'S MOTION.

APPENDIX M

FIFTEENTH JUDICIAL DISTRICT COURT
PARISH OF LAFAYETTE
STATE OF LOUISIANA

Filed
JUL 11 1988

MICHAEL J. GREEN

VERSUS

DOCKET NO:
85-7722-J

INDUSTRIAL HELICOPTERS,
INC., ET AL

::::::

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Intervenor, UNITED STATES FIDELITY & GUARANTY, against INDUSTRIAL HELICOPTERS, INC. in the amount of FORTY THREE THOUSAND SEVEN HUNDRED FORTY-SEVEN AND 75/100 ($43,747.75) Dollars, Workmen's Compensation Benefits paid to or on behalf of MICHAEL J. GREEN, said sums to be paid by preference and priority out of the principal sum awarded hereinabove to MICHAEL GREEN;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment entered herein in favor of defendant, DOUG WRIGHT and against plaintiff and intervenor, dismissing their claims against him with prejudice; and

Expert witness fees as itemized below are hereby taxed as additional Court costs including:

A.	Dr. William Barrios	$ 150.00
B.	Dr. Randolph Malloy	$ 350.00
C.	Dr. Thomas LaBorde	$ 175.00
D.	Dr. Michael Heard	$ 150.00

and all costs, including expert witness fees, are cast two-thirds (2/3rds) to defendant, INDUSTRIAL HELICOPTERS, INC. and one-third (1/3rd) to plaintiff, MICHAEL GREEN.

JUDGMENT READ, RENDERED AND SIGNED in Crowley, Acadia Parish, Louisiana, the 7th day of July, 1988.

/s/ Don Aaron, Jr.
DISTRICT JUDGE

APPROVED AS TO FORM:

SHELTON AND LEGENDRE
Attorneys at Law
Post Office Drawer 52548
2448 Johnston Street
Lafayette, LA 70505
318/233-7084

Bt: /s/ Karl W. Bengtson
KARL W. BENGTSON
Attorney for Plaintiff

GACHASSIN, HUNTER AND SIGUR
Attorneys at Law
Post Office Box 2850
102 St. John Street
Lafayette, LA 70501
318/235-4576

By: /s/ Nicholas Gachassin, Jr.
NICHOLAS GACHASSIN, JR.
Attorney for Intervenor

SONNIER, HEBERT & HEBERT
Attorneys at Law
Post Office Box 1040
Two South Magdelen Square
Abbeville, LA 70511
318/893-5973

By: /s/ Charles R. Sonnier
CHARLES R. SONNIER
Attorney for Defendants

Filed July 8, 1988

APPENDIX N

MICHAEL J. GREEN	*	15th JUDICIAL DISTRICT COURT,
VS. NO. 85-7722-J	*	IN AND FOR THE PARISH OF
INDUSTRIAL HELICOPTERS, INC.	*	LAFAYETTE, STATE OF LOUISIANA

REASONS FOR JUDGMENT

This matter was tried in Lafayette, Louisiana on May 3, 1988 and was submitted for a decision after receipt of post-trial memoranda from all counsel.

PRESENT: MR. KARL BENGTSON, for plaintiff, MICHAEL J. GREEN;

MR. CHARLES R. SONNIER, for defendants, INDUSTRIAL HELICOPTERS, INC. and DOUG WRIGHT; and

MR. NICHOLAS GACHASSIN and MS. LELIA COLLIER, for intervenors, SOUTHERN PETROLEUM LABORATORIES and UNITED STATES FIDELITY AND GUARANTY COMPANY.

Plaintiff, Michael J. Green, has filed suit against Industrial Helicopters, Inc. and Doug Wright for personal injuries sustained in a helicopter crash which occurred in the Gulf of Mexico approximately ninety (90) miles south of

Lafayette on November 26, 1984. At the time of the accident, plaintiff was employed as an offshore meter technician by Southern Petroleum Laboratories, Inc., who had contracted with Industrial Helicopters, Inc. for transport of its employees throughout the Gulf.

Based upon the evidence and testimony at trial, the Court makes the following findings of undisputed facts:

(1) On November 26, 1984, plaintiff and pilot Doug Wright left Picard Park in Milton, Louisiana in a Bell 206B aircraft owned by Petroleum Helicopters. In route to two (2) platforms in the High Island area, the craft stopped for refueling at the Exxon West Cameron 616 Platform.

(2) Shortly after taking off from the Exxon platform, the helicopter became disabled, and the pilot was forced to make an emergency landing in eight to ten foot seas.

(3) Plaintiff and the pilot were rescued by Exxon employees, who voluntarily launched an escape pod from Platform 616.

(4) The accident occurred in the course and scope of the Plaintiff's employment with Southern Petroleum Laboratories, Inc.

(5) At the time of trial, intervenor, U.S.F. & G. had paid plaintiff a total of $47,737.63 in compensation benefits and $18,747.75 in medical expenses, pursuant to the Longshoremen and Harbor Workers' Compensation Act.

The disputed issues at trial were the cause of the crash, the severity of the helicopter's impact with the water and the extent of the plaintiff's injuries.

Pilot Doug Wright testified that the take off from the Exxon platform was normal. Shortly thereafter, however, he began experiencing engine RPM fluctuations, which in turn brought about a decline in rotor RPMs. He explained that the craft could not maintain its altitude without 100% rotor RPMs. By decreasing pitch, the pilot was able to maintain constant 100% rotor RPMs. Because he still had partial engine power he testified that the craft did not go into a full auto-rotation before landing on the water. Hence, he was able to stop the craft's rate of descent so that it was "almost in a hover," thereby producing a normal landing about forty-five (45) seconds after the initial trouble started.

During this short period of time—as the plaintiff himself testified—Mr. Wright was able to maintain the aircraft in an upright position, inflate the pontoons and brief his passenger on emergency procedures. In the Court's opinion, Mr. Wright's handling of this emergency situation was extraordinary. Accordingly, the Court finds that pilot error was not a factor in this crash.

Based upon the testimony of Mr. Wright—which was uncontroverted regarding the craft's malfunction—the Court finds that the sole and proximate cause of the crash was the mechanical failure of the aircraft's governor—the device which controls the engine RPMs. Mr. Wright's version of the events immediately prior to impact is consistent with the explanation given by Mr. Craig Isak, a helicopter mechanic, who stated that without a properly functioning governor, the craft could not maintain altitude.

Plaintiff has alleged that defendants were negligent in failing to discover the defective governor by proper inspection. For the following reasons, the Court rejects this claim. Mr. Isak, a mechanic employed by Industrial Helicopters testified that the aircraft was routinely checked everyday, with a more detailed inspection every one hundred (100) hours of flying time. The last inspection of this helicopter—completed twenty (20) days before the crash—was done at 4618 hours flying time. On the day of the crash, the craft had logged only 4639 flying hours. Therefore, the next inspection was not due until another seventy-nine (79) hours. Additionally, Mr. Isak testified that the governor was a sealed unit not subject to internal inspection. Any problems could only be detected by pilot complaint. Furthermore, Industrial Helicopters, Inc. did not perform any repairs on the governor, which had to be sent to a special facility for maintenance. Based upon the above, the Court finds that Industrial Helicopters was not negligent in the inspection of its helicopter and that it was not possible for the defendant to have discovered the defective governor since no problem of this nature had been reported.

Although the plaintiff has failed to prove any negligence of Industrial Helicopters, Inc. in the care and operation of its helicopter, the defendant is nonetheless liable for any damages caused by a defective thing in its care, custody or control under Louisiana Civil Code Article 2317. The Court has already determined that the cause of the crash was the mechanical failure of the craft's governor, which created an unreasonable risk of harm to the occupants of the helicopter. Hence, the Court must now determine the extent of the damages, if any, that were caused by this defect.

The testimonies of the plaintiff and the pilot differ as to the severity of the helicopter's impact with the water.

According to the pilot, he was able to reduce the craft's rate of descent to almost zero, thereby producing a "soft" landing at the top of one of the swells. The plaintiff, however, described the descent as "vigorous and jarring," with the disabled craft slamming into the water at the bottom of a swell. Mr. Wright, a pilot with over 7000 hours of flying time and who had faced similar emergency situations, stated this landing was unremarkable. However, the Court finds that during the descent and the landing in eight (8) to ten (10) foot seas, the plaintiff was probably thrown forward and somewhat jolted, although he testified he did not strike any objects while still in the helicopter. Plaintiff did state, however, that he struck his chin on the escape capsule as Exxon personnel pulled him out of the water.

Defendants claim that they are not responsible for plaintiff's injuries because the negligence of Exxon employees in dropping plaintiff against the rescue capsule constitutes an intervening cause which absolves them from liability. The Court rejects this claim for two (2) reasons. First, negligence on the part of any Exxon personnel was never proven at trial. The rescue operation, in rough seas, was dangerous to both the Exxon employees and to Mr. Wright and Mr. Green. The fact that plaintiff may have been jostled about in these weather conditions does not establish that the rescuers breached any duty which they voluntarily assumed. Second, the events in the water occurring immediately after the crash do not meet the legal requirements of an intervening cause. To break the chain of causation, the act which causes damage must be totally independent of the tortfeasor's conduct. In this case, however, the rescue at sea was not only a foreseeable consequence of the crash, but was in fact merely a continuation of the events set into motion by the failure of the aircraft of defendant Industrial Helicopters.

Plaintiff claims to have suffered an injury to his temporomandibular joint (TMJ) and a soft tissue injury to his neck as a result of the helicopter crash and the ensuing rescue. Immediately after the accident he was treated for neck and shoulder complaints by Dr. Pat Sonnier. Dr. Sonnier then referred plaintiff to Dr. Thomas Laborde, a physical medicine and rehabilitation specialist, who treated plaintiff until January of 1988. Dr. Laborde observed tension, or involuntary muscle spasms, in plaintiff's neck. Negative results in diagnostic tests such as a myelogram and an EMG ruled out the possibility of a herniated disc and led Dr. Laborde to diagnose plaintiff's condition as chronic myofacial pain in the neck and shoulder area of which the TMJ problem is a component. This diagnosis was later verified by a thermogram. Dr. Laborde was unable to control plaintiff's neck pain. In his opinion, one explanation for this failure would be a structural problem with plaintiff's temporomandibular joint.

Dr. Joseph William Barrios, an expert in dentistry and TMJ problems, treated plaintiff from January 15, 1985 through June, 1985. During this time, plaintiff complained of headaches on a daily basis, difficulty in swallowing, jaw pain, and clicking and locking of the jaw. Dr. Barrios' objective findings included bilateral popping of the jaw, an opening and closing click and lateral movement of the jaw. These symptoms, as well as plaintiff's extreme sensitivity in the jaw area, indicated an internal derangement in plaintiff's jaw. Dr. Barrios' treatment included physical threapy, cortisone injections at trigger points and a splint, which plaintiff wore at all times, that was designed to recapture the TMJ disc to its normal position. After six (6) months, this treatment produced no major improvement. Dr. Barrios then referred plaintiff to Dr. Randolph Malloy, an oral and maxillofacial surgeon.

Dr. Malloy treated plaintiff from September 6, 1985 through November of 1987. He prescribed a new splint and taught plaintiff how to manipulate his jaw by hand to increase the space in his jaw joint. This treatment produced some intermittent success, with plaintiff's own estimation of his condition improving as much as seventy percent (70%). However, throughout this period, Dr. Malloy observed a decreasing range of movement in the jaw and noted that on several occasions plaintiff could not open it all. In Dr. Malloy's opinion, plaintiff is currently a candidate for surgery which could cost approximately $15,000.00.

Industrial Helicopters contends that plaintiff's medical problems were not caused by the helicopter crash of November 26, 1984. Defendant claims first that plaintiff's TMJ problems predated the accident and second that an automobile accident in December of 1987, in which plaintiff who was knocked unconscious, is the cause of his current condition.

Both Drs. Malloy and Barrios observed that plaintiff was missing eight (8) teeth and that he had a crossbite. Both concluded that these conditions could lead to TMJ problems by themselves even if the patient did not suffer any type of trauma. However, no evidence was presented at trial which suggested that plaintiff experienced any objective TMJ symptoms before the accident. The Court, therefore, finds that while plaintiff may have been susceptible to TMJ problems before the crash, the trauma and the tension associated with the accident of November 26, 1984 activated the symptoms from which he now suffers.

Nor does the Court accept defendant's claim that plaintiff's current condition was caused by the automobile accident of December, 1987. The record reflects that plaintiff experienced severe TMJ problems long before this acci-

dent. The Court particularly notes Dr. Malloy's observation that throughout the course of his treatment, the plaintiff continued to experience a decreasing range of motion in his jaw joint. This leads the Court to conclude that, while plaintiff was able to better manage his pain as a result of Dr. Malloy's treatment, no substantial change occurred in the nature of plaintiff's problem.

Plaintiff has also made substantial claims for loss of enjoyment of life, including the deterioration of his marriage, and loss of past and future wages.

The Court does not accept plaintiff's claim that his injuries were the primary cause of the break-up of his marriage. Plaintiff and his wife, Gwen, are currently separated, with no plans of reconciliation. The Court does not find that plaintiff's lifestyle has changed significantly since the accident, particularly in his inability to engage in sporting activities which he enjoyed prior to the accident.

Plaintiff seeks an award of $225,000.00 in economic damages, with $66,400.00 representing past lost wages from the date of the accident through the trial. At the time of the accident, plaintiff was employed as an offshore meter technician with an annual salary of $26,680.00. After the accident, he continued to work on light duty for approximately four (4) to five (5) months until he was laid off. He then attended a two (2) year program in electronics and is now employed as a solid state technician by MASCO, Inc. earning $17,700.00.

The Court finds that plaintiff is disabled from his former occupation, which involved lifting heavy equipment and tools. Nonetheless, plaintiff was capable of working after the accident, and he currently has a secure job. Furthermore, plaintiff has not shown that he would have been

able to continue as an offshore technician with Southern Petroleum Laboratories in the recent economic climate. Accordingly, the Court must partially discount his large claim for economic damages.

Plaintiff also seeks damages from Industrial Helicopters for interference with his current employment based on the doctrine of abuse of rights. He claims that Mr. Oran Richard, the owner of Industrial Helicopters, contacted his current employer in an attempt to punish him for filing this suit. The Court finds that Mr. Richard's motivation for contacting plaintiff's employer was purely economic. MASCO, Inc. performed electrical services on equipment owned by Industrial Helicopters and Mr. Richard, who did not know plaintiff personally, was concerned for the safety of his equipment during this pending litigation. Additionally, plaintiff has failed to prove any damages resulting from Mr. Richard's conduct because he retained his job. Therefore, this claim is denied.

The Court accordingly grants judgment in favor of plaintiff, Michael Green, against defendant, Industrial Helicopters, Inc., in the following amounts:

(1)	General Damages, which include mental anguish, physical suffering and loss of enjoyment of life.	$ 40,000.00
(2)	Economic damages, past and future.	$ 25,000.00
(3)	Medical Expenses, past.	$ 18,747.75
(4)	Medical Expenses, future.	$ 15,000.00
	Total	$ 98,747.75

together with legal interest thereon from date of judicial demand, until paid.

Plaintiff's claim against defendant Doug Wright is dismissed.

Intervenor U.S.F. & G.'s claim in the amount of $66,485.38 is hereby recognized and is payable to the extent that this Court has awarded damages for economic loss and medical expenses.

Costs are to be borne two-thirds (2/3) by defendant, Industrial Helicopters, Inc. and one-third (1/3) by plaintiff, Michael Green.

Judgment will be signed upon presentation.

Thus Rendered and Signed in Chambers, at Crowley, Louisiana this 1st day of June, 1988.

/s/ Don Aaron, Jr.
DISTRICT JUDGE

Filed June 2, 1988

STATE OF LOUSIANA PARISH OF LAFAYETTE

I hereby certify that a certified copy of this judgment has been mailed, served on all parties this 3rd day of June, 1988.

/s/ Maria Randolph
By Clerk of Court